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The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform

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THE CHRONIC FAILURE TO DISCIPLINE PROSECUTORS FOR MISCONDUCT: PROPOSALS FOR REFORM

THOMAS P. SULLIVAN* & MAURICE POSSLEY**

While most prosecutors adhere to the maxim that their primary task is to obtain just results, there are some who violate their ethical responsibilities in order to rack up convictions. This article describes the distressing, decades-long absence of discipline imposed on prosecutors whose knowing misconduct has resulted in terrible injustices being visited upon defendants throughout the country. Many honorable lawyers have failed to speak out about errant prosecutors, thus enabling their ethical breaches. The silent accessories include practicing lawyers and judges of trial and reviewing courts who, having observed prosecutorial misconduct, failed to take corrective action. Fault also lies with members of attorney disciplinary bodies who have not investigated widely publicized prosecutorial misconduct. This article summarizes the rules requiring all members of the bar to report unethical conduct. We focus particularly on lawyers who serve in prosecutors' offices, defense lawyers, and trial and reviewing court judges and their lawyer clerks, each of whom has a personal, non-delegable responsibility to report their knowledge of ethical breaches to disciplinary authorities.

In addition, the article identifies reforms to the justice system designed to reduce prosecutorial abuses: (1) substituting for the Brady rule a verifiable open-file pretrial discovery requirement on prosecutors; (2) instead of invoking harmless error, requiring reversal of convictions if

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serious prosecutorial misconduct is proven; (3) identifying errant prosecutors by name in trial and appellate opinions; (4) providing prosecutors with qualified instead of complete immunity from civil damages for misconduct; and (5) authorizing the Department of Justice's Office of Inspector General to handle investigations of alleged misconduct by federal prosecutors. The article also proposes that attorney disciplinary bodies adopt changes designed to more effectively discover and sanction misbehaving prosecutors. Lawyer organizations and bar associations are urged to speak out when prosecutors deviate from appropriate conduct, and law schools are encouraged to include instruction on ethical rules peculiar to the criminal practice.

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INTRODUCTION

The authors of this article have extensive experience with the criminal justice systems, state and federal. Possley is a Pulitzer Prize-winning journalist¹ with more than forty years of experience and the co-author of two surveys, cited *infra*, which revealed extensive prosecutorial misconduct in Chicago and California that had gone unpunished.² Sullivan has practiced law in Chicago for over sixty years, chiefly in civil and criminal litigation, including service for a brief period as a federal prosecutor. We believe that most prosecutors adhere to the precept that their primary function is not to obtain convictions, but to see that justice is done; hence, the threat of sanctions is not needed to persuade them to comply with their ethical obligations. Unfortunately, there are a few rogue prosecutors who flout the rules of professional conduct and bring our criminal justice system into

¹ *The 2008 Pulitzer Prize Winners: Investigative Reporting*, THE PULITZER PRIZES, <http://www.pulitzer.org/citation/2008-Investigative-Reporting> (last visited Nov. 4, 2015).

² KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA, 1997–2009, A VERITAS INITIATIVE REPORT 16 (2010), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncip_pubs; Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win. Part 1: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html>.

disrepute. The writings cited in this article—which span four decades—have identified and bemoaned this problem, but few have attempted—as we do in this article—to set forth a comprehensive series of practical proposals designed to identify and weed out the small, but insidious, group of miscreants, and to prevent future acts of prosecutorial misconduct.³

We have divided our article into three parts:⁴ Part I contains a review of the evidence that has accumulated over the past several decades and reveals an almost complete lack of discipline of errant prosecutors. Part II contains a summary of the rules that apply to all members of the bar, including judges, and require them to report serious lawyer misconduct to disciplinary bodies. In Part III, we set out our recommendations for reforms, which are directed to judges, prosecutors, state and federal disciplinary authorities and legislatures, organizations that promulgate codes of conduct for judges and lawyers, organizations that represent judges and lawyers, and law schools.

I. LACK OF DISCIPLINE FOR PROSECUTORIAL MISCONDUCT

The failure to punish prosecutors who engage in misconduct is not a recent phenomenon. To the contrary, it has been well known for many decades, as illustrated in the surveys and articles summarized below, prepared by those who have studied relevant cases and disciplinary systems.⁵

We begin in Part A with a few of the many cases in which misconduct was discovered but went unpunished. In Part B we cite surveys and articles that have called attention to this situation.

³ We do not mean to imply that violation of legal professional rules occurs only on the prosecution side of criminal prosecutions. There are of course defense lawyers who do not comply with the rules of professional conduct, and much contained in this article is applicable to them as well.

⁴ To simplify, we have used the masculine pronoun throughout.

⁵ Judge Alex Kozinski of the Ninth Circuit Court of Appeals recently made these cogent observations:

While most prosecutors are fair and honest, a legal environment that tolerates sharp prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same. Having strict rules that prosecutors must follow will thus not merely avoid the risk of letting a guilty man free to commit other crimes while an innocent one languishes his life away, it will also preserve the integrity of the prosecutorial process by shielding principled prosecutors from unfair competition from their less principled colleagues.

Hon. Alex Kozinski, *Preface: Criminal Law 2.0*, 44 ANN. REV. CRIM. PROC. iii, xxvi (2015) (forthcoming), http://georgetownlawjournal.org/files/2015/06/Kozinski_Preface.pdf.

A. EXAMPLES OF CASES INVOLVING PROSECUTORIAL MISCONDUCT WITH NO RESULTING DISCIPLINE

The reality of prosecutorial misconduct is best illustrated through the facts of specific cases, so we have gathered and summarized a few below.⁶ In none of these cases was the prosecutor disciplined.

After serving as a prosecutor in the Cuyahoga County District Attorney's office in Cleveland, Ohio, for thirty years, Carmen Marino retired in 2002.⁷ Over those three decades, Marino prosecuted scores of cases and racked up many convictions. Marino attributed his success to jurors, who he said were inclined to trust law enforcement and distrust defendants who did not testify in their trials.⁸ Upon Marino's retirement, the Cuyahoga County District Attorney began giving an annual award, christened the Carmen Marino Award, to a prosecutor in the office for "integrity and professionalism in the pursuit of justice."⁹

Six years later, however, the award was renamed Prosecutor of the Year Award because Marino's name had come to represent the worst—not the best—attributes of a prosecutor.¹⁰ Many of the convictions he obtained unraveled because of his misconduct: failing to disclose key pieces of evidence to defendants before trial; allowing prosecution witnesses to lie at trial;¹¹ and delivering improper, prejudicial closing arguments.¹²

⁶ These cases are taken from the National Registry of Exonerations, maintained at the University of Michigan School of Law, which contains details of the cases involving more than 1,800 defendants whose convictions have been overturned. Many of the cases involve prosecutors who violated their ethical responsibilities, but in only a few were disciplinary measures taken. *The National Registry of Exonerations*, UNIV. OF MICH. LAW SCH., <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Jun. 8, 2016).

⁷ Regina Brett, *County Prosecutor Bill Mason Should Retire Carmen Marino Award*, PLAIN DEALER (Oct. 03, 2008, 8:29 P.M.), http://www.cleveland.com/brett/blog/index.ssf/2008/09/regina_brett_county_prosecutor.html.

⁸ William Dawson, in his book *The Legal Matrix*, quoted Marino discussing his success as a prosecutor: "Marino said it's not difficult to win convictions in Ohio, as jurors are predisposed to find defendants guilty because they trust police and prosecutors. 'If the person doesn't take the stand, the jury knows he is guilty,' Marino said. 'That's my experience.'" WILLIAM DAWSON, *THE LEGAL MATRIX* 68 (2008).

⁹ Brett, *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² Radley Balko, *Sorry About Your Time on Death Row, Pal, Nothing We Can Do*, WASH. POST (Apr. 2, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/04/02/sorry-about-your-time-on-death-row-pal-nothing-we-can-do/>.

In 2003, the Center for Public Integrity, in a nationwide survey of prosecutorial misconduct from 1970 through 2002, reported that five of Marino's convictions had been overturned by Ohio reviewing courts.¹³ After Marino retired in 2002, the reversals kept coming. In 2004, a federal court cited ten cases in which Ohio state courts found Marino had engaged in prosecutorial misconduct.¹⁴

One of the most notable of Marino's reversals was the case involving Joseph D'Ambrosio, who was convicted of murder in 1989 and sentenced to death.¹⁵ The Ohio reviewing courts affirmed D'Ambrosio's conviction and sentence,¹⁶ and D'Ambrosio's state post-conviction petition for relief was denied.¹⁷ In March 2001, D'Ambrosio filed a federal petition for writ of habeas corpus based in part on a claim that Marino failed to disclose exculpatory evidence.¹⁸ In 2006, following an evidentiary hearing, a federal judge granted the petition based upon findings that D'Ambrosio was denied due process by the prosecution's failure to apprise him of exculpatory and impeachment evidence, including evidence that pointed to an alternative suspect with a strong motive to kill the victim. The judge ordered the state to either dismiss the charges or conduct another trial within 180 days.¹⁹ The warden appealed.²⁰ In 2008, the Sixth Circuit affirmed, noting that there was a "reasonable probability" that the outcome of D'Ambrosio's trial would have been different had the prosecution not suppressed evidence.²¹ The suppressed evidence would have both weakened the prosecution's case and strengthened D'Ambrosio's position that someone else committed the murder.²²

Disputes ensued concerning additional exculpatory evidence not previously disclosed to D'Ambrosio's lawyer. In 2010, after several state

¹³ CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS i (2003) [hereinafter CPI].

¹⁴ *In re Lott*, 366 F.3d 431, 433 n.1 (6th Cir. 2004).

¹⁵ *State v. D'Ambrosio*, 652 N.E.2d 710 (Ohio 1995).

¹⁶ *Id.* at 712, 716.

¹⁷ *State v. D'Ambrosio*, No. 75076, 2000 WL 283079, at *1 (Ohio Ct. App. Mar. 16, 2000), *appeal dismissed sua sponte*, 731 N.E.2d 1140 (Ohio 2000).

¹⁸ *D'Ambrosio v. Bagley*, No. 1:00 CV 2521, 2006 WL 1169926, at *10 (N.D. Ohio, Mar. 24, 2006).

¹⁹ *Id.* at *1.

²⁰ *D'Ambrosio v. Bagley*, 527 F.3d 489, 491 (6th Cir. 2008).

²¹ *Id.* at 499.

²² *Id.*

court proceedings related to D’Ambrosio’s retrial and other federal court proceedings,²³ U.S. District Judge Kathleen McDonald O’Malley ordered the state not to retry D’Ambrosio.²⁴ She lamented prosecutors’ improper withholding of evidence that tended to raise questions of D’Ambrosio’s guilt.²⁵ The judge said that the state’s testimony “only can be described as ‘strain[ing] credulity,’ and showing startling indifference to D’Ambrosio’s rights.”²⁶

The Sixth Circuit affirmed.²⁷ D’Ambrosio was released from prison after serving more than twenty years on Ohio’s Death Row.²⁸ His subsequently filed federal suit for damages against Cuyahoga County was dismissed, although the judge acknowledged the prosecutors “trampled upon D’Ambrosio’s constitutional rights.”²⁹

And the hits keep on coming. In March 2015, Cuyahoga County Common Pleas Judge Nancy Russo ordered a new trial for Eugene Johnson, Derrick Wheatt, and Laurese Glover, each of whom had spent nearly twenty years in prison for a murder in East Cleveland.³⁰ Judge Russo found that Marino intentionally withheld a trove of exculpatory evidence in the case, and at one point had written a letter to the East Cleveland police department ordering department officials to conceal all police reports and other

²³ See *D’Ambrosio v. Bagley*, 619 F. Supp. 2d 428, 433–45 (N.D. Ohio 2009); *D’Ambrosio v. Bagley*, 688 F. Supp. 2d 709, 713 (N.D. Ohio 2010).

²⁴ *D’Ambrosio*, 688 F. Supp. 2d at 735.

²⁵ *Id.* at 727.

²⁶ *Id.* at 728. The judge also stated:

For 20 years, the State held D’Ambrosio on death row, despite wrongfully withholding evidence that “would have substantially increased a reasonable juror’s doubt of D’Ambrosio’s guilt.” . . . [C]ertain of the State’s counsel baselessly attacked the state trial judge, came before this Court and supplied testimony that, charitably, only can be described as “strain[ing] credulity,” and showing startling indifference to D’Ambrosio’s rights.

Id. at 727–28.

²⁷ *D’Ambrosio v. Bagley*, 656 F.3d 379, 390 (6th Cir. 2011).

²⁸ Regina Brett, *Former Death Row Inmate Joe D’Ambrosio, Finally Free, Speaks Out*, PLAIN DEALER (Jan. 25, 2012), http://www.cleveland.com/brett/blog/index.ssf/2012/01/joe_dambrosio_finally_free_spe.html.

²⁹ *D’Ambrosio v. Marino*, No. 1:11 CV 933, 2013 WL 256312, at *15 (N.D. Ohio Jan. 23, 2013), *aff’d*, 747 F.3d 378 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 758, 190 L. Ed. 2d 628 (2014).

³⁰ Monica Robins, *Judge Grants New Trial for 3 Men Imprisoned for Murder*, WKYC-TV (Mar. 26, 2015, 6:37 PM), <http://www.wkyc.com/story/news/local/cuyahoga-county/2015/03/26/innocence-project-judge-nancy-russo-derrick-wheatt-laurese-glover-eugene-johnson/70484508/>.

information relating to the investigation.³¹ In rendering her decision, Judge Russo stated, “Marino is infamous in Cuyahoga County for his vindictive, unprofessional and outrageous misconduct in criminal cases.”³²

Despite this litany of misconduct, the Ohio State Bar has never publicly disciplined Carmen Marino.³³

Ohio is not alone. An Arizona man convicted of assaulting police officers when resisting arrest was exonerated after excessive force reports surfaced, suggesting that the officers may have beaten the twenty-three-year-old man.³⁴ In California, two defendants who had been convicted of murder based on identifications from two witnesses had their convictions overturned after one of the defendants uncovered that the police concealed evidence that

³¹ Opinion on Motion for New Trial at 2, 5, *Ohio v. Johnson*, CR 95-324431 (Ohio Ct. Com. Pl. Mar. 26, 2015), http://cpdocket.cp.cuyahogacounty.us/DisplayImageList.aspx?q=wXHMV_TgVTGXbBjf_x30fvRTNBnuueZz0.

³² Brief of Appellant at 12, *Ohio v. Johnson*, CR-102828 (Ohio Ct. App. July 1, 2015) (quoting Transcript of Trial Court Proceedings from Mar. 26, 2015 at 4), http://cpdocket.cp.cuyahogacounty.us/COA_CaseInformation_Summary.aspx?q=KAa3MWq76t4IB84YpHxuvvg2. Judge Russo lamented Marino’s work in office, stating: “[T]he human toll that has resulted from [Marino’s] tenure in our county’s office of the prosecutor is incalculable and never-ending.” *Id.* (quoting same at 5).

³³ THE SUPREME COURT OF OHIO, OFFICE OF ATTORNEY SERVS., *Attorney Information, Carmen Michael Marino*, http://www.supremecourtfohio.gov/AttySvcvs/AttyReg/Public_AttorneyDetails.asp?ID=0001617 (last visited Aug. 18, 2015). Marino is also still listed as an active attorney allowed to practice law. *Id.*

³⁴ Order Vacating Judgment and Convictions at 4–5, *Arizona v. Lewis*, CR20120036 (Ariz. Super. Ct. Dec. 3, 2013) [hereinafter *Lewis Order*], <http://www.gilacountyaz.gov/government/courts/docs/media/FINALVacatingJudgmentConvictions.pdf>. In Oct. 2011, twenty three-year-old Brandon Lewis was charged with assaulting three police officers in Payson, Arizona. *Id.* at 2. Lewis alleged that the officers said he violently resisted their efforts to administer a breathalyzer test. Complaint at 2, *Lewis v. Town of Payson*, No. CV2012-00175 (Ariz. Super. Ct. July 13, 2012). Lewis was treated for a fractured eye socket, a torn ear lobe, and bruises and abrasions to his arms and knees, *id.* at 3, which the officers said were self-inflicted when he slammed his head into the hood of his vehicle. Answer of Town of Payson at 6, *Lewis v. Town of Payson*, No. CV2012-00175 (Gila Cty. Super. Ct. Aug. 7, 2012). Lewis was convicted, but later exonerated after excessive force reports were discovered. *Lewis Order* at 10. The reports, which had been concealed by police, revealed inconsistencies with the officers’ testimony, raising the possibility that Lewis did not resist and had been severely beaten by the officers. *Id.* at 5. The reports also contained the names of witnesses whose identities had not been disclosed to Lewis’s defense attorney. *Id.* at 3. In vacating Lewis’s conviction in 2013, a Gila County Superior Court Judge declared, “It is an injustice that so many important and legally relevant documents were not properly disclosed prior to trial.” *Id.* at 10.

a witness had recanted and that law enforcement had paid the witnesses for their participation.³⁵

Illinois has a particularly long and sorry record when it comes to prosecutorial misconduct. A murder defendant whose conviction was secured in large part by one piece of evidence—a pair of shorts supposedly stained with blood consistent with the eight-year-old victim’s type³⁶—was released twelve years after his conviction, when he showed that the stain actually was paint.³⁷ The prosecutor knew at the time of trial that the stain was not blood.³⁸ Four men convicted of a 1992 double murder were ultimately exonerated and had their convictions vacated after the Illinois Attorney General’s Office discovered a prosecutor’s handwritten notes showing that police officers who testified against one of the defendants knew the defendant had been in lockup

³⁵ *Tennison v. San Francisco*, 548 F.3d 1293, 1296, 1298 (9th Cir. 2008). On August 19, 1989, after a car and foot chase through the streets of San Francisco, California, Roderick Shannon was shot to death in the parking lot of a convenience store. *Id.* at 1296. This occurred as public pressure mounted over more than forty gang-related killings that summer. Maurice Possley, *Antoine Goff*, UNIV. OF MICH. LAW SCH., NAT’L REGISTRY OF EXONERATIONS (Jan. 23, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3241>. Antoine Goff, 19, and John Tennison, 17, were charged with the murder. *Id.* No physical evidence linked them to the crime. *Id.* They were convicted in San Francisco County Superior Court based upon identifications provided by two young women who said they saw the shooting. *Id.* Tennison was sentenced to twenty five years to life and Goff to twenty seven years to life. *Id.* Both men lost their appeals in the California reviewing courts. *Id.* Years later, in 2003, a federal judge held a hearing on Tennison’s petition for habeas corpus, and overturned his conviction based upon what she learned about the original investigation, none of which was disclosed to the defense lawyers at the original trial: During the pretrial police investigation, one of the girls recanted her identification; she was then given a polygraph, which was inconclusive, then put on the telephone with the other girl, and then interviewed by the prosecutor, whereupon she reverted to her original identification. *Id.* The girls were paid \$2,500. *Id.* A man told the police he was involved in the shooting, but later recanted. *Id.* The state dismissed the charges, and Goff and Tennison sued the City of San Francisco, which settled collectively for \$7.5 million. *Id.*

³⁶ *People v. Miller*, 148 N.E.2d 455, 458 (Ill. 1958).

³⁷ *Miller v. Pate*, 386 U.S. 1, 5 (1967). In 1955, Miller was convicted and sentenced to death for the murder of an eight-year-old girl. *Id.* at 2. A major item of evidence was a pair of shorts found in an abandoned building a mile from the scene of the crime, which contained reddish-brown stains. *Id.* at 6. A chemist for the State Bureau of Crime Identification testified the stains were blood, consistent with the girl’s type. *Id.* at 3–4. It was later determined that the prosecutor was aware the stains were paint, not blood. *Id.* at 5. In 1967, the United States Supreme Court granted a writ of habeas corpus, saying, “[t]he prosecution deliberately misrepresented the truth.” *Id.* at 6. Miller was released after serving twelve years. *See* MICHAEL RADELET ET AL., *IN SPITE OF INNOCENCE* 141–52 (1992).

³⁸ *Miller*, 386 U.S. at 6.

at the time of the murder.³⁹ A man convicted of a 1995 murder and sentenced to fifty years was released thirteen years later after showing that the state's attorney's office knowingly withheld exculpatory evidence.⁴⁰

B. SURVEYS AND ARTICLES ILLUSTRATING LACK OF DISCIPLINE OF ERRANT PROSECUTORS

Studies of prosecutorial misconduct in criminal proceedings, many of which are cited below in this section, agree that courts rarely discipline prosecutors for misconduct. One of the leading sources of information about prosecutorial misconduct is Pace University Law School Professor Bennett L. Gershman's text, *Professional Misconduct*.⁴¹ In the first and second

³⁹ Maurice Possley, *Daniel Taylor*, UNIV. OF MICH. LAW SCH., NAT'L REGISTRY OF EXONERATIONS (June 24, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4212>. Daniel Taylor, Deon Patrick, Akia Phillips, and Lewis Gardner were indicted and convicted for the 1992 murder of a man and woman in Chicago. *Id.* All confessed to being involved in the crimes. *Id.* Almost immediately, Taylor repudiated his confession, claiming he was in the jail at the time of the murders. *Id.* Gardner and Phillips were sentenced to thirty years in prison, and Patrick and Taylor to life without parole. *Id.* While post-conviction proceedings were underway, members of the Illinois Attorney General's office discovered in the State's Attorney's files handwritten notes of an assistant state's attorney, which revealed that seven police officers—two of whom had testified at Taylor's trial—confirmed that Taylor was in the lockup at the time of the murders. *Id.* This disclosure unraveled the convictions of all four defendants. *Id.* Eventually, with the concurrence of the State's Attorney, Taylor was judicially exonerated and released in June 2013. *Id.* Patrick was similarly exonerated and released in January 2014, and not long afterward the convictions of Gardner and Phillips—who were released on parole in 2007—were vacated and the charges dismissed. *Id.*

⁴⁰ *People v. Beaman*, 890 N.E.2d 500, 502 (Ill. 2008). In 1995, Alan Beaman was convicted of murder and sentenced to fifty years in prison in McLean County, Illinois. *Id.* In 2008, the Supreme Court of Illinois held that the State's Attorney knowingly withheld exculpatory evidence relating to an alternative suspect from Beaman's defense lawyers. *Id.* at 511. After analyzing the facts, the Illinois Supreme Court said:

We conclude that there is a reasonable probability that the result of the trial would have been different if petitioner had presented the evidence [of] . . . an alternative suspect. We cannot have confidence in the verdict finding petitioner guilty of this crime given the tenuous nature of the circumstantial evidence against him, along with the nondisclosure of critical evidence that would have countered the state's argument that all other potential suspects had been eliminated from consideration. Accordingly, we conclude that the State's suppression of the withheld evidence violated petitioner's constitutional right to due process under *Brady*.

Id. at 514. In 2009, all charges against Beaman were dismissed, and he was released after serving thirteen years in prison. Center on Wrongful Convictions, *Alan W. Beaman*, UNIV. OF MICH. LAW SCH., NAT'L REGISTRY OF EXONERATIONS (Sept. 25, 2014), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3018>. In 2015 the Governor granted Beaman's petition for executive clemency. *Id.*

⁴¹ BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (2d ed.), Westlaw (database

editions of the book, which were published fifteen years apart,⁴² Gershman noted that prosecutorial misconduct was an increasing problem.⁴³ Gershman, a former prosecutor with the Manhattan District Attorney’s Office, has authored numerous articles as well as two editions of *Professional Misconduct* on prosecutorial and judicial ethics.⁴⁴ He attributed the growing misconduct problem to prosecutors’ growing powers, and to courts’ failure to discipline prosecutors for professional wrongdoing.⁴⁵

The costs of prosecutorial misconduct—to the wrongfully convicted defendants, to the victims, and to taxpayers—are high. A Chicago Tribune study of 11,000 criminal cases between 1963 and 1999 uncovered 381 homicide convictions that were vacated because prosecutors hid exculpatory evidence or allowed witnesses to lie.⁴⁶

Prosecutorial misconduct appears to often go unpunished even after it is identified. A survey of alleged prosecutorial misconduct in more than 11,000

updated Sept. 2015). Professor Gershman has devoted 600 pages to reported instances of prosecutorial misconduct. *Id.* The book identifies a range of prosecutorial misconduct, from wrongdoing in the investigation, to failing to disclose exculpatory evidence, to misusing the media, to misconduct in sentencing. *Id.* §§ 1:1–1:52, 5:1–5:25, 6:1–6:37, 13:1–13:19.

⁴² *Id.* at Preface to Second Edition.

⁴³ *Id.* In the first edition of *Prosecutorial Misconduct*, Professor Gershman summarized the state of affairs in three short sentences: “Restraints on prosecutorial misconduct are either meaningless or nonexistent. Relatively few judicial or constitutional sanctions exist to penalize or deter misconduct; the available sanctions are sparingly used and even when used have not proved effective. Misconduct is commonly met with judicial passivity and bar association hypocrisy.” BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* ix (1st ed. 1985).

⁴⁴ *Bennett L. Gershman*, PACE UNIVERSITY LAW SCHOOL, <http://www.law.pace.edu/faculty/bennett-l-gershman> (last visited Aug. 19, 2015).

⁴⁵ GERSHMAN, *supra* note 41, at Preface to Second Edition (“The prosecutor’s dominance in American criminal law, well established when the book was first published in 1985, has become even more entrenched. The last fifteen years are most notable for a vast accretion of power by prosecutors, increased deference by courts to prosecutorial prerogatives, and a general failure of courts and disciplinary bodies to impose meaningful sanctions on prosecutors for misconduct.”).

⁴⁶ Armstrong & Possley, *supra* note 2. In January 1999, the Chicago Tribune published a series of articles by reporters Ken Armstrong and Maurice Possley (co-author of this article), titled *Trial and Error: How Prosecutors Sacrifice Justice to Win*. *Id.* The authors noted:

The appellate courts denounced the prosecutors’ actions with words like ‘unforgivable,’ ‘intolerable,’ ‘beyond reprehension,’ and ‘illegal, improper and dishonest.’ At least a dozen of the prosecutors were investigated by state agencies charged with policing lawyers for misconduct. . . . One was fired, but appealed and was reinstated with back pay. Another received an in-house suspension of 30 days. A third prosecutor’s law license was suspended for 59 days, but because of other misconduct in the case. Not one received any kind of public sanction from a state lawyer disciplinary agency.

Id.

criminal proceedings found 2,000 cases where the appellate courts reduced sentences, dismissed charges, or vacated convictions.⁴⁷ But the courts disciplined prosecutors only forty-four times in the cases reviewed.⁴⁸ A 2010 USA Today study of Department of Justice (“DOJ”) criminal prosecutions found 201 cases where federal prosecutors acted improperly, but in a review of bar records could only locate a single instance where a federal prosecutor was disbarred in the last twelve years.⁴⁹ And prosecutors are disciplined less frequently than private attorneys.⁵⁰

⁴⁷ CPI, *supra* note 13, at i–ii, 73–100. The survey was conducted by CPI, a national organization devoted to investigating and reporting on a wide array of important national issues. *Id.* The study involved national investigations of local prosecutors’ conduct in all types of criminal proceedings. *Id.* A team of twenty one researchers, writers, and editors analyzed 11,452 state appellate court opinions, trial court rulings, state bar disciplinary filings, and other sources back to 1970, in which allegations were made of prosecutorial misconduct in criminal cases. *Id.* The results revealed that individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges, reversing convictions, or reducing sentences in more than 2,000 cases. *Id.* In over 500 other cases, judges stated that prosecutorial misconduct was serious enough to merit additional discussion or, in dissent, reversal. In many others, judges labeled prosecutorial behavior inappropriate, but upheld convictions using the harmless error doctrine. *Id.* The authors located only thirty four cases in which discipline was imposed on the errant prosecutors. *Id.*; *see also* CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 8 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf> (making similar findings of a lack of discipline for misconduct despite a high number of instances).

⁴⁸ CPI, *supra* note 13, at 79–80.

⁴⁹ Brad Heath & Kevin McCoy, *Prosecutors’ Conduct Can Tip Justice Scales*, USA TODAY (Sept. 23, 2010, 1:31 PM), http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm; *see also* Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct But Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution* (Pepperdine Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 10, 2016), <http://ssrn.com/abstract=2761252>.

⁵⁰ Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 755 (2001). Professor Zacharias conducted a study of “all reported cases in which prosecutors have been disciplined for violations of professional rules by courts or state disciplinary authorities.” *Id.* at 744. His analysis of the kinds of violations of the rules of professional conduct that are applicable to all attorneys, as well as those specifically applicable to prosecutors, revealed that “on the whole . . . prosecutors are disciplined rarely, both in the abstract and relative to private lawyers. . . . [T]he discrepancy between discipline of prosecutors and private attorneys is enormous.” *Id.* at 755. A reporter for the *San Jose Mercury News* analyzed 1,464 cases summarized in the *Bar Journal of California State Bar* from 2001 to 2005, of the most serious categories of discipline—disbarment, probation, and suspension. *See* Mike Zapler, *State Bar Ignores Errant Lawyers*, SAN JOSE MERCURY NEWS (Feb. 12, 2006, 5:31 PM), http://www.mercurynews.com/taintedtrials/ci_5136869. Of the seventy-five criminal cases found, only one involved a prosecutor, while seventy-four involved defense lawyers. *Id.* Additionally, Professor Alschuler wrote:

The entities charged with disciplining prosecutors for misconduct are poorly equipped to do so. Even though all states have adopted disciplinary rules that forbid prosecutors from suppressing exculpatory evidence or falsifying evidence, prosecutors who engage in this proscribed behavior are sanctioned infrequently—if at all.⁵¹ Bar associations discipline attorneys for misusing or abusing client funds but are not equipped to, or do not, review prosecutors' work.⁵² The DOJ's Office of Professional Responsibility ("OPR" or "Office"), tasked with overseeing federal prosecutors and other agents, began investigations in only 9 percent of the 4,000 complaints filed against officials in the last twenty years. Only 4 percent of those were determined to have merit, and the Office provided little disclosure about what punishments it applied.⁵³

In preparing this article [examining courtroom misconduct of prosecutors and judges], I surveyed the reported decisions for the past twenty-five years. Although I uncovered a large number of cases in which defense attorneys had been punished for contemptuous courtroom behavior, I did not find a single case in which a prosecutor had been so disciplined.

Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 *TEX. L. REV.* 629, 674 (1972).

⁵¹ Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors For Brady Violations: A Paper Tiger*, 65 *N.C. L. REV.* 693, 697 (1987). Professor Rosen conducted an exhaustive search of sources, including every state's disciplinary body. *Id.* He concluded: "[D]espite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence and falsification of evidence, and despite numerous reported cases showing violations of these rules, disciplinary charges have been brought infrequently and meaningful sanctions rarely applied." *Id.* "A prosecutor who suppresses evidence, falsifies evidence, or permits a witness to commit perjury too often remains unpunished." *Id.* at 742.

⁵² JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 181 (2000). The authors, with others of the New York City-based Innocence Project, reconstructed sixty-two cases in which convicted defendants had been exonerated, often after lengthy prison sentences, with some facing the death penalty. *Id.* at 263–64. They found prosecutorial misconduct involved in many cases, including suppression of favorable evidence, knowing use of false testimony, and coerced witnesses. *Id.* at 265. The authors noted the irony in the way states' disciplinary systems functioned:

Nearly all disciplinary action by bar associations arises from abuse of client funds— typically money that was given to an attorney to be held in escrow for a home purchase. In circumstances where life and liberty are at stake, though, most state bar associations are ill-equipped to review the ethical behavior of prosecutors, and they almost never do so.

Id. at 181.

⁵³ See William Moushey, *Win at All Costs*, *PITT. POST-GAZETTE*, Nov. 22, 1998, at A1. In a series of articles published between November 22 and December 13, 1998, reporter William Moushey reported on his examination of over 1,500 cases in which federal agents and prosecutors were accused of engaging in misconduct in order to obtain convictions:

This [Office of Professional Responsibility] within the Justice Department is supposed to oversee

The lack of discipline imposed on prosecutors who violate the code of professional ethics has been widely observed in legal literature.⁵⁴ But despite this well-known problem, the landscape has not shifted.⁵⁵ Courts and ethics bodies rarely sanction prosecutors, and the rare disciplinary measures tend to be mere slaps on the wrist.⁵⁶ This trend of inaction is consistent even in

the conduct of federal agents and prosecutors, but little oversight is happening. The office opened official investigations into only 9 percent of the 4,000 complaints filed against federal law enforcement officials during the past 20 years. The office found that only 4 percent of those complaints had merit. Since the office only discloses specifics of its investigations on rare occasions, it is not clear what punishment was meted out.

Id. at A-12.

⁵⁴ See, e.g., Alschuler, *supra* note 50, at 673 (“The legal profession has long contended that its lofty ideals are effectuated through a process of rigorous self-policing, but at least in the area of prosecutorial misconduct, its pretensions have been totally unfounded.”); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 72 (1995) (“[T]he process for sanctioning wrongful conduct of federal prosecutors is structurally inadequate.”). “The public record suggests, however, that federal prosecutors are rarely, if ever, referred to federal grievance committees.” *Id.* at 83. “Without a doubt, the dearth of reported disciplinary proceedings brought by state authorities against federal prosecutors reflects that not only are they rarely reported, but such proceedings are also rarely initiated.” *Id.* at 89. “There are certainly enough authorities—federal and state, external and internal—overseeing federal prosecutors. Yet, commentators have uniformly lamented the lack of effective discipline of prosecutors who violate standards of professional conduct.” *Id.* at 94. See also Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 979 (1984) (“Prosecutors’ unethical trial conduct is too common and too destructive to ignore. . . . Frequent misconduct by prosecutors is subversive to the perception that the American legal profession is capable of self-policing professional standards.”). “For too long we have ignored a self-evident fact—unethical conduct by prosecutors at trial is seldom dealt with by the grievance process.” *Id.* at 988.

⁵⁵ Michael L. Perlin, “Power and Greed and the Corruptible Seed”: Mental Disability, Prosecutorial Misconduct, and the Death Penalty 9–10 (2014) (unpublished manuscript) (on file with authors) (“There is little incentive for prosecutors to reform their ways. There is often absolutely no accountability. . . . Even if the misconduct is noticed, the defendant’s conviction is still likely to stand. And there is no stigma to the miscreant prosecutor since s/he is virtually never mentioned in any subsequent appellate opinion. . . . Although scholars have written frequently and persuasively about ethical breaches in such cases (and the need to monitor such breaches), their words are generally met with overwhelming indifference.” (endnotes omitted)). “In short, prosecutors have virtually carte blanche authority to misinform jurors, to play to irrational fears, and to employ unscrupulous experts. And there are virtually no voices raised in opposition.” *Id.* at 15.

⁵⁶ See CTR. FOR PROSECUTOR INTEGRITY, *supra* note 47, at 8 (“So what happens when ethical codes are violated? Nine studies have analyzed the professional consequences of prosecutor misconduct. . . . Of the 3,625 instances of misconduct identified, these studies reveal that public sanctions are imposed in only 63 cases -- less than 2% of the time[.]. Often, these sanctions represented only a proverbial ‘slap-of-the-wrist.’ . . . Even in the most reprehensible cases, judges typically do not refer the case for disciplinary action and ethics

arguably the most egregious cases of prosecutorial misconduct: the suppression of exculpatory evidence.⁵⁷ Alleged misconduct or breaches of ethical codes are infrequently reported due to ineffective (or a complete lack of) policies and means to gather the information in both state and federal courts.⁵⁸

In sum, “professional responsibility measures [are] almost always ineffective in the prosecutorial misconduct context.”⁵⁹ As a result, sanctions and disciplinary measures have been no real threat to prosecutors.⁶⁰

boards fail to apply sanctions. Courts rely upon fault-absolving notions like ‘harmless error,’ a doctrine that has been termed the ‘lie that the criminal justice system tells itself.’”)

⁵⁷ Ellen Yaroshfsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 288 (2004) (“The most common, and in any event the most dangerous misconduct is the intentional suppression of exculpatory evidence. Despite this well documented and all too recurrent violation of professional responsibility, prosecutors who engage in such tactics are rarely, if ever, disciplined.”).

⁵⁸ See, e.g., Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276–77 (2007) (“Even when it [prosecutorial abuse or misconduct] is discovered, the legal remedies are ineffective. . . . [R]eferrals of prosecutors rarely occur. Even when referrals occur, state bar authorities seldom hold prosecutors accountable for misconduct.”). “[T]he state disciplinary process has proven woefully inadequate in holding prosecutors accountable for misconduct.” *Id.* at 282. “Until the rules and the disciplinary process are reformed, prosecutors will continue to engage in misconduct without consequences.” *Id.* at 310. See also Michael S. McGinniss, *Sending the Message: Using Technology to Support Judicial Reporting of Lawyer Misconduct to State Disciplinary Agencies*, 2013 J. PROF. LAW. 37 (2013) (“Despite the strong public interest in effectively regulating lawyers, neither state nor federal courts have developed adequate policies and practices to ensure that lawyers’ misconduct during litigation proceedings is consistently reported to state disciplinary agencies.”). “State and federal courts have generally failed to adopt rules, or even informal but reliable policies and practices, to ensure that lawyers’ ethical violations are consistently reported to disciplinary agencies in the lawyers’ jurisdictions of licensure.” *Id.* at 59.

⁵⁹ David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 213 (2011). “[P]rofessional responsibility measures as they are currently composed do a poor job of policing prosecutorial misconduct.” *Id.* at 203. “[P]rosecutors have rarely been subjected to disciplinary action by state bar authorities.” *Id.* at 205.

⁶⁰ See Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 902 (1997) (“If the prosecutor’s duty to make the disclosures required by *Brady* is to be honored, it is not fear of disciplinary proceedings before the bar association that will bring this about.”). “*Brady* recognizes a right fundamental to a fair trial. It is simply ignored by all too many prosecutors whenever its observance appears to threaten the prospect of a conviction.” *Id.* at 933. For more examples of a lack of discipline against prosecutors, see BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 168 (2011); RIDOLFI & POSSLEY, *supra* note 2, at 16; Brian P. Barrow, Buckley v. Fitzsimmons: *Tradition*

II. ALL JUDGES AND LAWYERS—INCLUDING THEIR LAWYER CLERKS— HAVE PROFESSIONAL OBLIGATIONS TO REPORT SERIOUS PROSECUTORIAL MISCONDUCT TO DISCIPLINARY AUTHORITIES

As shown above, during the past forty years virtually none of the reported cases of prosecutors' violations of the rules of professional conduct—regardless of the subject, severity, and extent of the violation—have been reported to disciplinary authorities. This is a problem that cries out for a cure, which ought to be initiated by those involved on a daily basis in the state and federal criminal justice systems—trial and reviewing court judges and their lawyer clerks, as well as prosecutors and defense lawyers, and the organizations that represent them. The continued failure to report prosecutorial misconduct raises questions about the fairness of our systems and our ability as a profession to discipline itself. In addition, the non-

Pays a Price for the Reduction of Prosecutorial Misconduct, 16 WHITTIER L. REV. 301, 327 (1995); Elizabeth N. Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1456 (2006); Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting The Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 40 (1987); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 565 (2007) [hereinafter Gershman I]; Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 722 (2006) [hereinafter Gershman II]; Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062–63 (2009); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 829 (1999); Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 521 (2011); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 565 (1987); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403, 427–28 (2006); Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1337–38 (2009); Kozinski, *supra* note 5, at viii, xxii–xxvii, xxxi–xxxiii, xxxix–xlii; McGinniss, *supra* note 58, at 59; Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption is Wrong*, 80 FORDHAM L. REV. 537, 572 (2011); Richard G. Singer, *Forensic Misconduct by Federal Prosecutors—and How It Grew*, 20 ALA. L. REV. 227 *passim* (1968); Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 33 (2009); Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3472 (1999); Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS, 913, 919–21 (2012); Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System that Protects Them*, HUFFINGTON POST (Aug. 5, 2013, 11:25 AM), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html (“Prosecutors are relied upon to police themselves, and it isn't working.”); Bennett L. Gershman, *How to Hold Bad Prosecutors Accountable: The Case for a Commission on Prosecutorial Misconduct*, THE DAILY BEAST (Aug. 31, 2015), <http://www.thedailybeast.com/articles/2015/08/31/how-to-hold-bad-prosecutors-accountable-the-case-for-a-commission-on-prosecutorial-conduct.html>.

reporting of known breaches of other lawyers' ethical responsibilities, if serious and therefore reportable, has the potential of involving the non-reporters in separate professional violations.

A. RULES APPLICABLE TO ALL STATE COURT JUDGES, ALL STATE AND FEDERAL PROSECUTORS, AND ALL LAW CLERKS

The following discussion is based upon the American Bar Association's Model Rules of Professional Conduct (hereafter "Rules" or "Professional Rules"), and Model Code of Judicial Conduct (hereafter "Judicial Code" or "Code"). With variations as explained in the Appendix, the Professional Rules have been adopted by all states except California, and the Judicial Code by twenty-nine states.

The Rules and Code contain well thought-out principles and commentary and guidelines for the conduct of judges and lawyers, including those employed as state and federal prosecutors and state court judges.⁶¹ Here are the applicable provisions:

• *Professional Rules.*⁶² Rule 8.3(a) of the Professional Rules, entitled "Reporting Professional Misconduct," provides: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty,

⁶¹ AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 170 (1970) [hereinafter ABA REPORT] ("A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counselors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.") (quoting CANONS OF PROFESSIONAL ETHICS [AND] CANONS OF JUDICIAL ETHICS Canon 11 (1937)).

⁶² Although it has not been definitively determined whether state court judges as lawyers are bound by the Professional Rules in addition to the Judicial Code, in this article we assume state court judges are not subject to the Rules, because the Code is directed solely to judges, while the Rules are directed solely to non-judicial lawyers. Law clerks in federal prosecutor offices are bound by the rules of professional conduct in the states where they are licensed. 28 U.S.C. § 530B (2012); 28 C.F.R. § 77.2(a) (2014). Law clerks for federal judges are also bound by the rules applicable to judicial employees. CODE OF CONDUCT FOR JUDICIAL EMPLOYEES, GUIDE TO JUDICIARY POLICY, Vol. 2, Pt. A §§ 310.10(a), 310.30, 320 (2013), <http://www.uscourts.gov/file/vol02a-ch03pdf>. Judicial clerks are also subject to applicable rules of professional conduct in the states in which they are licensed. *See id.* at § 320. Law clerks in federal prosecutor offices are bound by the United States Attorneys' Manual, which contains reporting requirements that mirror those of federal prosecutors. UNITED STATES ATTORNEYS' MANUAL § 1-4.100 (2010), <http://www.justice.gov/usam/usam-1-4000-standards-conduct#1-4.100> [hereinafter USAM].

trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority.”⁶³

• *Judicial Code*. Rule 2.15 (B) and (D) of the Judicial Code provide:

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects *shall* inform the appropriate authority. . . . (D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct *shall* take appropriate action.⁶⁴

Both the Judicial Code and Professional Rules define “knowledge” and “knows” as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”⁶⁵ Rule 1.0(l) of the Professional Rules provides, “‘Substantial’ when used in reference to a degree or extent denotes a material matter of clear and weighty importance.”⁶⁶

B. RULES APPLICABLE TO ALL FEDERAL JUDGES AND THEIR LAW CLERKS

Federal judges are bound by the Code of Judicial Conduct for United States Judges, which has been adopted by the Judicial Conference of the United States pursuant to its statutory authority.⁶⁷ These rules apply to federal circuit and district court judges, magistrate judges, bankruptcy judges, and the Federal Court of Claims. Canon 3(B)(5) of the code provides: “A judge *should* take appropriate action upon learning of reliable evidence indicating the likelihood that a judge’s conduct contravened this Code or a lawyer violated applicable rules of professional conduct.”⁶⁸ The Commentary to this rule provides in relevant part:

Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities Appropriate action may also include responding to a subpoena to testify or otherwise

⁶³ PROFESSIONAL RULES r. 8.3(a) (2009) (emphasis added).

⁶⁴ MODEL CODE OF JUDICIAL CONDUCT Canon 2, r. 2.15(B) and (C) (2010) [hereinafter CODE OF JUDICIAL CODE] (emphasis added).

⁶⁵ RULES r. 1.0(f); CODE, Terminology.

⁶⁶ RULES r. 1.0(l).

⁶⁷ 28 U.S.C. § 331 (2012) (“The Conference may also prescribe and modify rules for the exercise of the authority provided in chapter 16 of this title [Complaints Against Judges and Judicial Discipline]”).

⁶⁸ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(B)(5) (2014).

participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.⁶⁹

A federal statute provides that all federal attorneys are subject to the same state laws and rules, as well as local federal court rules, that govern attorneys in the state where the attorney practices.⁷⁰ They are also required to comply with the reporting requirements of the United States Attorneys' Manual.⁷¹ Section 1-4.100 of the Manual provides: "Evidence and non-frivolous allegations of serious misconduct by Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice *shall* be reported to OPR."⁷²

C. THE KINDS OF PROSECUTORIAL MISCONDUCT THAT SHOULD BE REPORTED

Prosecutorial misconduct ordinarily comes into play in connection with the processing of criminal cases. For example, a prosecutor may violate the ethical norms of his practice when coordinating with police and agents who are questioning potential witnesses, examining crime scenes, identifying suspects, collecting items of evidence, conducting grand jury hearings, preparing indictments, dealing with defense lawyers handling pretrial motion practice, providing "discovery" of evidence to the defense, negotiating guilty pleas, preparing for and participating in bench and jury trials, conducting jury selection, making opening statements, introducing prosecution evidence and witnesses, cross examining defense witnesses, drafting jury instructions, and making closing arguments. Every step of this process presents the potential for misconduct by prosecutors.

In applying the general rules set out above, it is necessary to determine what conduct falls within the ambit of the reporting requirements in both the Rules and Code, namely, "a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"⁷³ The United States Attorneys' Manual uses the word "serious" to trigger reporting to the

⁶⁹ *Id.* at Canon 3(B)(5) cmt.

⁷⁰ 28 U.S.C. § 530B(a) (2012). Other statutes include the Jencks Act, which relates to a federal prosecutor's duty to produce prior statements made by government witnesses. 18 U.S.C. § 3500 (2012). Prosecutors are also subject to the Federal Rules of Criminal Procedure 11 (pleas of guilty) and 16 (discovery obligations). FED. R. CRIM. P. 11, 16.

⁷¹ USAM §§ 1-4.100, 1-4.120.

⁷² *Id.* § 1-4.100(B) (emphasis added).

⁷³ PROFESSIONAL RULES r. 8.3(a); JUDICIAL CODE Cannon 2, Rule 2.15(B).

OPR.⁷⁴ These provisions are phrased in conclusory terms and do not specify with precision the kinds of conduct that trigger the reporting. However, some guidance is contained in the comments to the Professional Rules:⁷⁵

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. *The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.*

The Terminology section of the Professional Rules states: “‘Substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.”⁷⁶ Comment 1 to Code Rule 2.15 states in part: “This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.”⁷⁷ Even with these additional provisions, the lines of demarcation as to reportable conduct are imprecise—bright lines are missing—hence the facts and good judgment govern application of the rules.⁷⁸

In this article we will use the word “serious” to describe reportable conduct, although we recognize that this is itself a flexible concept subject to interpretation. Seriousness may be measured by the degree of a major

⁷⁴ USAM § 1-4.100(B).

⁷⁵ PROFESSIONAL RULES r. 8.3(a) cmt. 3 (emphasis added); *see also id.* at cmt. 1 (“Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation [sic] when they know of a violation of the Rules of Professional Conduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.”). *See also* Sup. Ct. Ohio Bd. of Comm’rs on Grievances & Discipline, Advisory Op. 2016-2 (“A lawyer has a duty to report unprivileged knowledge of another lawyer’s misconduct under [RULE 8.3].”).

⁷⁶ PROFESSIONAL RULES r. 1.0(l).

⁷⁷ JUDICIAL CODE Canon 2, Rule 2.15 cmt. 1; *see also* STANDARDS FOR IMPOSING LAWYER SANCTIONS § III.C.6.11 (1992), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf (“Disbarment is generally appropriate when a lawyer, with intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.”); *id.* § III.C.6.12 (noting that suspension is generally appropriate when a lawyer knows of the same circumstances and takes no remedial action).

⁷⁸ *See* Leslie W. Abramson, *The Judge’s Ethical Duty to Report Misconduct by Other Judges and Lawyers and its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 769–71 (1997).

individual deviation from accepted professional norms or by the cumulative effect of a series of violations or unfair dealings with defense counsel or the courts. Triggering events do not involve honest mistakes or good faith errors of judgment, because those do not call into question the prosecutor's honesty, trustworthiness, or fitness to be a member of the legal profession, which is necessary to triggering the rule's reporting requirement.

It is important to bear in mind that the duties imposed on lawyers to report serious misconduct to disciplinary authorities are more expansive than the test for reversible or harmless error. An example of this distinction may be illustrated by the prosecutor's duty pursuant to the Due Process Clause to make pretrial disclosure of exculpatory evidence to the defense, as required by *Brady v. Maryland*⁷⁹ and its progeny, compared to the duties on the same subject imposed by the Professional Rules⁸⁰ and similar codes adopted by states. As we observe in Part III.C.1, *infra*, in most of the reported cases in which defendants argued on appeal for reversals and new trials because the prosecution failed to disclose favorable evidence as required by *Brady*, reviewing courts have held that the failure to produce did not affect the outcome of the case and was therefore harmless error. Nevertheless, the prosecution's failure to produce may be reportable to disciplinary authorities, pursuant to applicable rules of professional conduct. These reports do not focus on whether the conduct is considered grounds for reversal, but rather on the seriousness of the prosecutor's conduct without regard to the outcome of the case. The American Bar Association has issued a Formal Opinion directed specifically to this point:

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d) establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation. The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation. In particular Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.⁸¹

⁷⁹ 373 U.S. 83 (1963). References in this article to "*Brady*" include its progeny.

⁸⁰ PROFESSIONAL RULES r. 3.8 ("The prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]").

⁸¹ ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opinion_09_454.pdf; *see also* discussion in Part III.B.1, *infra*.

This same distinction is drawn in case law and the United States Attorneys' Manual, as explained in greater detail in Part III.B.1 below.

D. THE FAILURE TO REPORT A LAWYER'S SERIOUS MISCONDUCT IS ITSELF A VIOLATION OF THE PROFESSIONAL RULES AND THE JUDICIAL CODE

The findings cited in Part I and the many published appellate court opinions describing prosecutorial misconduct establish beyond reasonable doubt that during the past several decades countless instances of prosecutorial misconduct were not reported to disciplinary authorities. It is reasonable to assume that many cases involved misconduct that reached the level of "seriousness" that triggered an obligation on the part of the lawyers and judges who were aware of the misconduct to report promptly to disciplinary bodies. In each case, the failure of the lawyer or judge with knowledge to report was a separate violation of the rules.

The National Prosecution Standards, adopted by the National District Attorneys Association (NDAA), a national organization of state prosecutors, explicitly recognize the risk to prosecutors for not reporting known violations by fellow prosecutors of the rules described above.⁸² The Duty to Report Misconduct provides: "A prosecutor's failure to report known misconduct may itself constitute a violation of the prosecutor's professional duties."⁸³

Several state supreme courts have enforced this obligation by imposing discipline on non-reporting lawyers. In *In re Himmel*,⁸⁴ Illinois lawyer James Himmel became aware that his client's former lawyer, Casey, had embezzled funds that were owed to the client.⁸⁵ The client was worried that any action against Casey would delay her recovery of the missing funds. Himmel therefore prepared a settlement agreement with Casey and agreed not to report him to the Illinois disciplinary authority; in exchange, the client agreed to share the proceeds of any recovery with Himmel.⁸⁶ The Supreme Court of Illinois suspended Himmel for one year for his action, saying: "This failure to report resulted in interference with the Commission's investigation of

⁸² NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 1-1.6(d) (3d ed. 2009), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> [hereinafter NAT'L PROSECUTION STANDARDS].

⁸³ *Id.*

⁸⁴ 533 N.E.2d 790 (Ill. 1988).

⁸⁵ *Id.* at 791.

⁸⁶ *Id.* at 792. The report must be made to the Illinois Attorney and Registration Disciplinary Commission; reporting to the trial court does not discharge the duty to report. *Skolnick v. Alzheimer & Gray*, 730 N.E.2d 4, 15 (Ill. 2000).

Casey, and thus with the administration of justice We are particularly disturbed by the fact that respondent drafted a settlement agreement with Casey rather than report his misconduct.”⁸⁷

A similar conclusion was reached in *In re Riehlmann*,⁸⁸ which involved Louisiana lawyer Michael Riehlmann, who was told by former prosecutor Gary Deegan that when Deegan was prosecuting a murder case, he intentionally withheld from the defense lawyer a crime lab report that exculpated the defendant, who was convicted and sentenced to death.⁸⁹ Riehlmann eventually told the defense lawyers and the current prosecutor what Deegan said, but he did not inform the Louisiana Office of Disciplinary Counsel (ODC) until after Deegan’s death five years later, when Riehlmann learned the defendant was about to be executed.⁹⁰ The Louisiana Supreme Court observed that the case presented it “for the first time with an opportunity to delineate the scope of an attorney’s duty under rule 8.3 to report the professional misconduct of a fellow member of the bar.”⁹¹ The court found that Riehlmann’s earlier report to the defense lawyers and the District Attorney did not fulfill his reporting obligation: “Respondent’s knowledge of Mr. Deegan’s conduct was sufficient to impose on him an obligation to promptly report Mr. Deegan to the ODC. Having failed in that obligation, respondent is himself subject to punishment.”⁹²

⁸⁷ *Id.* at 795–96. Commenting on the rule of the *Himmel* case, an Illinois lawyer wrote: “Lawyers *may* report any ethical violation to an appropriate disciplinary authority but they *must* report only those violations that relate to a lawyer’s honesty and fitness to practice law.” Kenneth R. Landis, You May Be Your Brother’s Keeper: When *Must* You Report Another Lawyer’s Misconduct To a Disciplinary Authority? 5 (undated) (unpublished manuscript) (on file with author) (emphasis in original).

⁸⁸ 891 So. 2d 1239 (La. 2003).

⁸⁹ *Id.* at 1241.

⁹⁰ *Id.* at 1242.

⁹¹ *Id.* at 1246.

⁹² *Id.* at 1249; *see also In re Bruno*, 956 So. 2d 577, 579, 582–83 (La. 2007) (suspending Bruno from practicing law in part for failing to make timely disclosure of a false statement made by his co-counsel to a federal district court judge); *In re Tolchinsky*, 740 So. 2d 109, 110–11 (La. 1999) (disbarring Tolchinsky for, *inter alia*, not reporting the improper conduct of his employee, a disbarred lawyer); Vincent R. Johnson, *Legal Malpractice Litigation and the Duty to Report Misconduct*, 1 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 40, 46–47 (2011) (“With notable examples to the contrary, lawyers are rarely sanctioned for [failure to report infractions].”); Diane S. Ciolino, *Rule 8.3. Reporting Professional Misconduct: Annotations*, LOUISIANA LEGAL ETHICS, <http://lalegaethics.org/louisiana-rules-of-professional-conduct/article-8-maintaining-the-integrity-of-the-profession/rule-8-3-reporting-professional-misconduct/#fnref-360-3> (last updated Feb. 28, 2015) (detailing other instances of attorney discipline in Louisiana for failure to report violations). *But see* D.C. Bar Ass’n, Formal Ethics Op. 246: A Lawyer’s Obligation to Report Another Lawyer’s Misconduct,

The Supreme Court of South Dakota observed that the same potential for violation of the rules applies to members of the judiciary:

Among the administrative responsibilities imposed on a judge in Canon 3, therefore, is that of taking or initiating appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. Thus, a judge exposes himself or herself to the disciplinary action for failure to report the misconduct of other judges or attorneys to attorney disciplinary bodies and judicial conduct commissions.⁹³

With these rules in mind, we turn to recommendations for the various persons and organizations involved in the criminal judicial process.

III. PROPOSALS FOR REFORMS IN CRIMINAL CASES

We submit the following proposals in the hope that the incidence of misconduct in criminal cases will decline and that the few prosecutors who violate their ethical obligations and blot the profession's reputation will receive appropriate discipline. While this article is directed primarily at prosecutorial misconduct, many of the comments and recommendations apply equally to defense lawyers.

A. RECOMMENDATIONS DIRECTED TO TRIAL COURT JUDGES IN CRIMINAL CASES

1. Trial court judges should comply with their obligations to report serious lawyer misconduct to disciplinary authorities.

Trial judges, both state and federal, are on the front line when it comes to observing the conduct of the lawyers who appear before them. They oversee pretrial discovery including *Brady* motions, and deal with the trial lawyers about witness and evidentiary issues. They handle guilty pleas. They conduct bench trials, referee jury trials, and rule on evidentiary issues and the objections that inevitably occur during trials. They impose sentences and wrestle with all the other myriad matters in the criminal system.⁹⁴ Over time,

<https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion246.cfm> (Oct. 18, 1994) (holding no duty to report another lawyer's violation when the knowledge stems from a malpractice suit a client wishes to file against the other lawyer).

⁹³ *In re Discipline of Laprath*, 670 N.W.2d 41, 63–64 (S.D. 2003).

⁹⁴ For examples of potential prosecutorial misconduct, see Alschuler, *supra* note 50, at 674; Angela J. Davis, *The American Prosecutor: Independence, Power and the Threat of Tyranny*, 86 IOWA L. REV. 393, 410–17 (2001); Gershman II, *supra* note 60, at 688; Joy, *supra* note 60, at 402–03; Michael Ghetti & Paul Killebrew, *With Impunity: The Lack Of Accountability Of A Criminal Prosecutor*, 13 LOY. J. PUB. INT. L. 349, 358–60 (2012); Green,

trial judges get to know many of the prosecutors and defense lawyers who practice before them and learn which ones are inclined to push or cross the limits of acceptable behavior. Judge D. Brooks Smith of the Third Circuit stated: “The trial court is where issues of prosecutorial misconduct really play out. . . . District courts are in a better position [than are appellate courts] to ensure that a prosecutor properly fulfills the duties and obligations of his office.”⁹⁵ This obligation is consistent with the court’s obligation to supervise professional ethics:

In reporting disciplinary violations by lawyers, judges would be enforcing the rules for which they themselves are responsible. By and large, courts have been jealous of their power to regulate the conduct of lawyers in this country and have been unwilling to cede this responsibility to legislatures or to administrative bodies. Courts should not be able to have it both ways. If they are going to maintain responsibility for rules of conduct and their enforcement, then they should be taking the lead in enforcement with respect to violations that occur in front of them They should forward matters for investigation when there is an apparent violation even if they are not certain and do not have the time or the resources to make a crucial finding of fact.⁹⁶

Personal relationships may make it difficult and distasteful to report to disciplinary authorities,⁹⁷ but the serious policy concerns implicated by prosecutorial misconduct require action: “Indeed, the silent judge may have integrity, but consider the price of the judge’s silence: the unreported offensive conduct will continue to infest the legal system. Judges should demonstrate the responsibility to take action and thereby protect the court system they serve.”⁹⁸

supra note 54, at 80–81 n.65; Keenan, *supra* note 59, at 203–04; Rosen, *supra* note 51, at 734–35; Steele, *supra* note 54, at 970–75; Weeks, *supra* note 60, at 883–96; Zacharias, *supra* note 50, at 724; Note, *The Natures and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 980 n.165 (1954) [hereinafter Columbia Note].

⁹⁵ D. Brooks Smith, *Policing Prosecutors: What Role Can Appellate Courts Play?*, 38 HOFSTRA L. REV. 835, 835–36 (2010) (quoting *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998)); see also McGinniss, *supra* note 58, at 54–55; Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1436–37, 1462–64, 1471–72 (2004).

⁹⁶ Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 862 (1989).

⁹⁷ Trial court judges in criminal courts are often appointed directly from or after serving as prosecutors or defense lawyers, and therefore are dealing with friends, former colleagues, and adversaries, resulting in understandable reluctance to instigate disciplinary action. See Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win. Part 5: Break Rules Be Promoted*, CHI. TRIB. (Jan. 14, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial5-story.html>.

⁹⁸ Abramson, *supra* note 78, at 780.

The materials contained in Part I show that most trial court judges and lawyer members of their staffs have remained silent.⁹⁹ Although attention is usually focused on the wrongdoing of prosecutors, trial judges share a portion of the blame when trials are not conducted fairly. Written over thirty years ago, this remains true today:

Although the role of the judiciary in the enforcement of our profession's ethical standards is but one scene, it affects the entire play. The judge's ethical code says that judges should be active, but that mandate is ignored. This sets the stage for the hypocrisy of the entire production. If self-regulation is to be viable and believable, both to the public and to the players themselves, there must be some minimum level of honesty and commitment.¹⁰⁰

To a practicing lawyer, the threat of personal discipline, whether before a court or separate disciplinary authority, is serious business. The accused prosecutor is no longer the aggressor, but rather is on the defensive, in an unfamiliar, career-threatening proceeding. He must justify his conduct without an immunity shield. The potential consequences are severe—public sanction, suspension, disbarment, and/or loss of license and employment. If the disciplinary system operates promptly and fairly, it will provide a far greater deterrent than reversal of a conviction with the expense of retrial paid for by others.¹⁰¹ The example set by disciplinary proceedings also carries a powerful ripple effect, a shot across the bow to others who may be tempted to stray from a righteous path.

Accordingly, when attorney misconduct is brought to the attention of a trial judge or a judge's legal staff member, he has an ethical duty to consider whether the matter requires that he inform the appropriate disciplinary authority or take other action.¹⁰² If trial judges comply with the mandatory provisions of the Code of Judicial Conduct, they will help get rid of errant prosecutors and increase the fairness of the criminal justice system.¹⁰³

⁹⁹ See McMorrow et al., *supra* note 95, at 1435 (“Judges are not a significant source of reporting misconduct to the bar disciplinary apparatus.”). “[F]ederal courts relatively rarely rely on the state disciplinary system to regulate attorney misconduct in their courts.” *Id.* at 1443.

¹⁰⁰ John M. Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 116 (1982).

¹⁰¹ See Barrow, *supra* note 60, at 329 (“The key feature of all of these methods of discipline is that they make the errant prosecutor answerable to a professional body or association that is vested with the power to discipline, suspend, or even disbar its members. . . . For the benefit of the criminal justice system, the Court must realign its focus to the application of disciplinary measures for errant prosecutors[.]”).

¹⁰² Abramson, *supra* note 78, at 759.

¹⁰³ For examples of trial court judges who have complied with this rule, see United States

2. *When appropriate, trial court judges should use their own powers to sanction lawyer misconduct.*

In addition to reporting prosecutorial misconduct to disciplinary authorities, state and federal trial court judges have the power to control the conduct of lawyers who appear before them, and to impose sanctions on those who misbehave. Some of these powers are inherent, and some are derived from statutes and court rules. For example, trial judges may hold lawyers in contempt for unprofessional conduct that occurs in cases before them.¹⁰⁴ This is especially important when the misconduct is not deemed serious enough to require granting a new trial but the offender should nevertheless be called to account. A catalogue of potential disciplinary remedies available to trial courts is contained in an opinion of an Eleventh Circuit panel:

On the matter of professional misconduct of prosecutors, the realities require that we defer to our colleagues on the district courts to take the lead. . . . The district courts have many potential remedies available: (1) contempt citations; (2) fines; (3) reprimands; (4) suspension from the court's bar; (5) removal or disqualification from office; and (6) recommendations to bar associations to take disciplinary action.¹⁰⁵

v. Bowen, 969 F. Supp. 2d 518, 546 (E.D. La. 2012) (sending copy of order to state disciplinary board and federal district's Lawyers Disciplinary Enforcement Committee), *aff'd*, No. 13-31078, 2015 WL 4925029 at *19 (5th Cir. Aug. 18, 2015); *United States v. Lane*, 577 F. Supp. 504, 512 n.16 (N.D. Ill. 1983) (reporting prosecutor misconduct “[i]n light of [the] court's duty under . . . Canon 3B(3)"); *In re Maurice*, 167 B.R. 114, 128 (Bankr. N.D. Ill., 1994); *Comm. on Prof'l Ethics of Iowa State Bar Ass'n. v. Ramey*, 512 N.W.2d 569, 571 (Iowa 1994) (commending trial judge for referring lawyer's conduct to state ethics committee); *In re Bruno*, 956 So. 2d 577, 578 (La. 2007) (noting that District Court, sitting en banc, appointed the U.S. Attorney to investigate Bruno's conduct); and Denis Slattery, *Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct*, N.Y. DAILY NEWS (Apr. 6, 2014), <http://www.nydailynews.com/new-york/bronx/bronx-prosecutor-barred-courtroom-article-1.1746238>.

¹⁰⁴ 18 U.S.C. § 401 (2012); FED. R. CRIM. P. 42(a); *see also* GERSHMAN, *supra* note 41 § 14:9 (“Although contempt is frequently used to punish defense counsel for misconduct, it is rarely used to punish prosecutors.”); Alschuler, *supra* note 50, at 673–74 (“There is no reason why contempt citations could not be used to control prosecutorial conduct in the same way that they have been used to control the conduct of defense attorneys and lawyers in civil cases.”); Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, *passim* (1971); Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 39 LOY. U. CHI. L. REV. 39, 58–59 (1987); Green, *supra* note 54, at 80–81; Kirchmeier et al., *supra* note 60, at 1373; Singer, *supra* note 60, at 276; Zacharias, *supra* note 50, at 763–64; Columbia Note, *supra* note 94, at 983–84. Contempt may be imposed summarily when the misconduct occurs in the judge's presence; otherwise, a hearing must be conducted. *See Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979).

¹⁰⁵ *United States v. Wilson*, 149 F.3d 1298, 1303–04 (11th Cir. 1998) (“We thus find

3. *Trial judges should enter pretrial orders that provide for full compliance with prosecutors' obligations to produce exculpatory evidence, and that contain quickly available sanctions for non-compliance.*

Trial court judges may help ensure adherence to the rules of professional conduct by requiring in pretrial discovery orders that prosecutors respond fully and fairly to discovery requests in accordance with their obligations under the Constitution and the applicable rules of professional conduct, and by ensuring that known violations will expose prosecutors summarily to disciplinary action.

Trial judges have the power to require prosecutors to make pretrial production of evidence that “tends to negate the guilt of the accused or mitigates the offense,” as required by Model Rule 3.8(d).¹⁰⁶ This rule imposes what may be a distasteful obligation to prosecutors—to provide the defense with witnesses and evidence that undermine the prosecution’s case—and hence the temptation to grasp for reasons for non-disclosure may be strong. The Department of Justice has provided an excellent approach to this subject in the Memorandum for Department Prosecutors, January 4, 2010, which provides in part:

Step 3: Making the Disclosures . . . Section 9-5.001 [of the USAM] details the Department’s policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. *Prosecutors are encouraged to provide discovery broader and more comprehensive than the discovery obligations.*¹⁰⁷

The District of Columbia Court of Appeals recently explained why the prosecution’s discovery obligations should not be measured by the harmless error test often used on appeal to determine whether non-production requires reversal of convictions:

Retrospective analysis, while it necessarily comports with appellate review, is wholly inapplicable in pretrial prospective determinations [“T]he due process underpinning of *Brady-Agurs* is a command for disclosure [b]efore an accused has to defend himself” It is impossible for a trial court at the pretrial stage to require “the

ourselves in a situation with which we are all too familiar: a prosecutor has engaged in misconduct at trial, but no reversible error has been shown.”) “That we find an error not to be reversible does not transmute that error into a virtue. The error is still an error.” *Id.* (quoting *United States v. Eason*, 920 F.2d 731, 737 (11th Cir. 1990)).

¹⁰⁶ PROFESSIONAL RULES r. 3.8(d).

¹⁰⁷ Memorandum for Department Prosecutors from Deputy Att’y Gen. David W. Ogden, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), <http://www.justice.gov/dag/memorandum-department-prosecutors> [hereinafter DOJ Memo] (italicized emphasis added).

defendant . . . to satisfy the test of materiality normally associated with a retrospective *Brady-Agurs* inquiry, namely, materiality to outcome . . . No one has that gift of prophecy.” Therefore, “[t]o argue that the court can apply a material-to-outcome test before trial is to argue a contradiction.”¹⁰⁸

B. RECOMMENDATIONS DIRECTED TO JUDGES WHO SERVE ON REVIEWING COURTS

1. Judges on reviewing courts should comply with their obligations to report serious lawyer misconduct to disciplinary authorities.

Reviewing courts in both the state and federal systems set the rules as well as the tone for lawyer conduct. They have an important but largely unfulfilled role, indeed a duty, to help prevent the kinds of prosecutorial misconduct often disclosed in records on appeal. But regardless of the severity of the misconduct, with few exceptions no reports have been made to disciplinary bodies.¹⁰⁹ In the vast majority of cases, reviewing courts deal with alleged prosecutorial misconduct by determining whether it occurred, and if so whether it constituted harmless or harmful error, and issue their opinions without considering whether the conduct is sufficiently serious to require reference to disciplinary authorities. When this occurs, the judges do not fully perform their judicial functions.¹¹⁰ As was written over forty years

¹⁰⁸ *In re Kline*, 113 A.3d 202, 208 (D.C. 2015) (quoting *Lewis v. United States*, 408 A.2d 303, 306–07 (D.C. 1979)).

¹⁰⁹ For examples of appellate courts in criminal and civil cases reporting lawyer misconduct to disciplinary authorities, see *Aversa v. United States*, 99 F.3d 1200, 1216 (1st Cir. 1996); *Igo v. Coachmen Indus.*, 938 F.2d 650, 655, 659 (6th Cir. 1991); *United States v. Swanson*, 943 F.2d 1070, 1076 (9th Cir. 1991); *Lewis v. Lane*, 832 F.2d 1446, 1459, 1465 (7th Cir. 1987); *Lowenschuss v. Bluhdorn*, 613 F.2d 18, 21 (2d Cir. 1980); *Asphalt Eng’rs, Inc. v. Galusha*, 770 P.2d 1180, 1184 (Ariz. Ct. App. 1989); *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 396–97 (Haw. 1996); *Bettencourt v. Bettencourt*, 909 P.2d 553, 555, 558 (Haw. 1995); *Cap Rock Elec. Coop. v. Tex. Utils. Elec.*, 874 S.W.2d 92, 98 n.1, 102–03 (Tex. Ct. App. 1994); *Gonzales v. State*, 768 S.W.2d 471, 473 (Tex. Ct. App. 1989) (directing trial judge, pursuant to the Judicial Code, to report prosecutor to state bar); *State v. Wade*, 839 A.2d 559, 562, 565–66 (Vt. 2003) (Johnson, J., concurring) (referring matter to state disciplinary authority despite majority’s refusal); *State v. Hohman*, 420 A.2d 852, 855 (Vt. 1980), *overruled on other grounds by Jones v. Shea*, 532 A.2d 571, 572 (Vt. 1987); *Covington v. Smith*, 582 S.E.2d 756, 772 (W. Va. 2003); *Gum v. Dudley*, 505 S.E.2d 391, 405 (W. Va. 1997).

¹¹⁰ McGinniss, *supra* note 58, at 59 (“State and federal courts have generally failed to adopt rules, or even informed but reliable policies and practices, to ensure that lawyers’ ethical violations are consistently reported to disciplinary agencies in the lawyers’ jurisdictions of licensure. This deficiency needlessly feeds the perception that courts are unwilling to take the steps necessary to secure full accountability of lawyers for their misconduct and thereby

ago: “If appellate judges would consistently demand careful and dignified trial procedures as a prerequisite to criminal conviction, their concern would be effectively communicated to the trial courts.”¹¹¹

The duty to report lawyer misconduct does not depend on the outcome on appeal, as discussed above in Part II.C. Although prosecutorial misconduct may be considered harmless error, it may nevertheless yet violate the Professional Rules, because the harmless error doctrine does not set the standard for determining whether lawyer misconduct is reportable to disciplinary authorities. This distinction was made explicit by the ABA¹¹² and cases in which reviewing courts have affirmed convictions and considered their obligation to report prosecutorial misconduct.¹¹³ The United States

protect the public.”).

¹¹¹ Alschuler, *supra* note 50, at 675; *see also* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 677 (2013) (“[C]ommon sense and experience suggest that the possibility of judicial review encourages compliance with discovery obligations. Prosecutors are more likely to take the obligations seriously if noncompliance carries a risk of professional discipline or judicial enforcement.”).

¹¹² ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opinion_09_454.pdf (“Courts as well as commentators have recognized that the ethical obligations more demanding than the constitutional obligation. The ABA Standards for Criminal Justice likewise acknowledges that prosecutors’ ethical duty of disclosure extends beyond the constitutional obligation.”).

¹¹³ *See* United States v. Starusko, 729 F.2d 256, 264–65 (3d Cir. 1984); *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (“[W]e hold that Rule 3.8(e) [the counterpart to Model Rule 38(d)] requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny.”); *In re Feland*, 820 N.W.2d 672, 676 (N.D. 2012) (noting that conviction in disciplinary proceeding’s underlying criminal case was affirmed on the basis of harmless error in spite of finding that the prosecutor had withheld exculpatory evidence). The *Feland* Court imposed discipline on the prosecutor, saying:

A prosecutor’s ethical duty to disclose all exculpatory evidence to the defense does not vary depending upon the strength of the other evidence in the case. . . Rule 3.8(d) does not impose a materiality element similar to that applied in *Brady* and [N.D. Rule of Criminal Procedure] 16 . . . [A] prosecutor’s ethical obligation to disclose under Rule 3.8(d) is broader than the duty under *Brady* and Rule 16 and our refusal to grant a new trial in [the underlying case] does not preclude this disciplinary proceeding[.]

Id. at 678. “[W]e believe adequate protection of the public, particularly those persons accused of a crime, requires that prosecutors not only refrain from intentionally withholding exculpatory evidence but that they conform their conduct so they do not knowingly or negligently withhold such evidence.” *Id.* at 80. *See also* *Hohman*, 420 A.2d at 855 (“Unethical conduct, however worthy of censure, does not necessarily deprive a defendant of a fair trial, and is therefore distinguishable from prejudicial error.”); *Rosen*, *supra* note 51, at 714 (“An ethical violation can, and often will, be present even when due process is not violated.”); RIDOLFI & POSSLEY, *supra* note 2 at 64–65; Columbia Note, *supra* note 94, at 977 (“[T]he

Attorneys' Manual emphasizes this distinction.¹¹⁴

While Judicial Code 2.15 calls upon judges to “inform” disciplinary authorities, discussing prosecutorial deviations in opinions does not satisfy the rule. For the greatest impact, and to comply with the Judicial Code, the communication should come directly from the court to the authority. Chastising prosecutors in appellate opinions and even reversing convictions for misconduct does not carry the same impact as referral for potential bar discipline. The threat of disciplinary action, separate from the decision in the case in which misconduct occurred, sends a powerful message not only to the lawyer involved who has his reputation and perhaps license at stake, but also to others who may be tempted to deviate from appropriate standards of conduct.¹¹⁵

attempt to obtain a verdict by improper means requires disciplining of the attorney, who has shown that he is not sufficiently aware of the duties of his office. Such a penalty, to be imposed regardless of the outcome of the trial and appeal and after a determination of the prosecutor's culpability, should counteract the temptation to gamble on misconduct to obtain favorable verdicts.”).

¹¹⁴ USAM § 9-5.001C (“**Disclosure of exculpatory and impeachment beyond that which is constitutionally and legally required.** . . . [T]his policy requires disclosure by prosecutors of information beyond that which is ‘material’ to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999) . . . **1. Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.” (emphasis in original)); see also DOJ Memo, *supra* note 107 (“Section 9-5.001 details the Department’s policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations.”).

¹¹⁵ Rosen, *supra* note 51, at 736 (“Reviewing more cases will be an empty gesture unless and until prosecutors face serious discipline for suppressing or falsifying evidence.”); Slobogin, *supra* note 60, at 35 (“Reprimand, suspension or disbarment is likely to have much more of a deterrent effect on a prosecutor than a reversal or a finding that the prosecutor’s error was harmless.”). Many years ago, Professor John M. Levy of Marshall-Wayne School of Law made these observations about courts’ teaching role:

[T]here is a connection between the fact that law students do not identify and articulate ethical questions when they are presented with them in actual practice situations and the fact that courts, especially appellate courts, do not discuss ethical violations presented by cases before them . . . Appellate courts in their written opinions must, *sua sponte*, set out any serious ethical question which the record or the conduct of the lawyers brings to their attention and, moreover, state that the question is being referred to the appropriate agency for investigation.

Levy, *supra* note 100, at 97; see also Part III.I, *infra*, concerning law schools.

2. *Reviewing court judges should include in their opinions the names of lawyers who engage in serious or repeated misconduct.*

No matter whether reviewing courts affirm or reverse criminal convictions, they should include in their opinions the names of the offending lawyers (prosecutors and defense) when the record discloses evidence of serious or repeated misconduct, along with a description of the wrongful conduct.¹¹⁶ This has been approved in *United States v. Hastings*,¹¹⁷ in which the Supreme Court ruled that when courts of appeal set aside criminal convictions because prosecutors engaged in misconduct, an acceptable sanction available is “publicly chast[ening] the prosecutor by identifying him in its opinion.”¹¹⁸

Professor Peter J. Henning of Wayne State University Law School discussed an opinion of the Ninth Circuit that reversed a criminal conviction involving “extensive and continuing prosecutorial misconduct, including misrepresentations to the trial court by the Assistant United States Attorney.”¹¹⁹ The Court of Appeals remanded the case to the trial court to consider dismissal due to the severity of the prosecutorial misconduct, but without disclosing the Assistant’s name.¹²⁰ Professor Henning asked rhetorically: “Why withhold the identity of a prosecutor the court found had essentially lied to the judge and to the defense counsel, and then tried to cover up the misconduct?”¹²¹ In a recent journal article, Judge Alex Kozinski agreed:

Naming names and taking prosecutors to task for misbehavior can have magical qualities in assuring compliance with constitutional rights. . . . Judges who see bad behavior by those appearing before them, especially prosecutors who wield great power and have greater ethical responsibilities, must hold such misconduct up to the light of public scrutiny.¹²²

¹¹⁶ See, e.g., *Zapata v. Vasquez*, 788 F.3d 1106, 1110 (9th Cir. 2015); *In re Cook*, 49 F.3d 263, 266–68 (7th Cir. 1995); *United States v. Burse*, 531 F.2d 1151, 1154 (2d Cir. 1976); *Cap Rock Elec. Coop., Inc. v. Tex. Utils. Elec. Co.*, 874 S.W.2d 92, 98 n.1, 102–03 (Tex. Ct. App. 1994).

¹¹⁷ 461 U.S. 499 (1986).

¹¹⁸ *Id.* at 506 n.5. The court suggested several other disciplinary actions, including “directing the District Court to order the prosecutor to show cause,” and “asking the Department of Justice to initiate a disciplinary proceeding against him.” *Id.*

¹¹⁹ Henning, *supra* note 60, at 830–31 (citing *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993)).

¹²⁰ *Id.*

¹²¹ *Id.*; accord RIDOLFI & POSSLEY, *supra* note 2, at 50.

¹²² Kozinski, *supra* note 5, at xxxvi.

By adopting this practice, reviewing courts will capture the attention of the trial bar, and confirm that the courts are serious about enforcing the rules of professional conduct. Judge D. Brooks Smith of the Third Circuit pointedly observed:

I believe that the overwhelming majority of prosecutors would recoil at the notion of her or his name being publicly linked to what is, quite plainly, legal wrong-doing. Judicial opprobrium directed against a lawyer on ethical grounds is not the stuff of which successful careers are normally built—at least not in the prosecutorial realm.¹²³

Including names of serious offenders in published opinions would also enable the creation of a database to receive and store judicial reports of criminal litigation-related lawyer misconduct.¹²⁴

3. *Reviewing courts should use their disciplinary powers in appropriate cases.*

We need not repeat the discussion of courts' contempt powers contained above in Part III.A.2. When faced with lawyer misconduct, use of contempt by appellate courts was recommended a good many years ago, including cases in which the appellate court affirms the trial court:

When reversal is not warranted, contempt penalties directed specifically against the prosecutor may be an appropriate and effective remedy. Such a sanction enables the judge to both maintain the integrity and dignity of the court through immediate action and ensure that the trial will be free from willful obstruction. Moreover, contempt penalties allow the judge to fashion a wide variety of sanctions which are commensurate with the severity of the misconduct displayed.¹²⁵

Federal reviewing courts may invoke their powers under the Rules of Appellate Procedure concerning suspension or disbarment.¹²⁶ State reviewing courts have similar statutory, rule, and inherent authority.¹²⁷

¹²³ Smith, *supra* note 95, at 842. See also Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305 (2016) (evaluating and providing examples of shaming as a deterrent to prosecutorial misconduct).

¹²⁴ McGinniss, *supra* note 58, at 74.

¹²⁵ Rona Feinberg, *The Second Circuit Reacts to Prosecutorial Misconduct*, 49 BROOK. L. REV. 1245, 1263 (1983); see also *United States v. Drummond*, 481 F.2d 62, 63 (2d Cir. 1973).

¹²⁶ FED. R. APP. P. 46(b), (c); see also *In re Bagdade*, 334 F.2d 568, 571–72 (7th Cir. 2003); *In re Cook*, 49 F.3d 263, 267–68 (7th Cir. 1995) (suspending attorney from Circuit bar for two years for embezzling client funds from settlement disbursement). See generally *Campos v. Inv. Mgmt. Props., Inc.*, 917 S.W.2d 351, 356 (Tex. Ct. App. 1996) (assessing ten times the taxable costs upon appellant).

¹²⁷ Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 2008 J. OF THE PROF. LAW. 359, 380–87.

C. RECOMMENDATIONS DIRECTED TO FEDERAL AND STATE
LEGISLATURES AND SUPREME COURTS

1. *The United States Supreme Court, state supreme courts, and legislatures should require open file discovery in all felony cases and restrict the harmless error rule.*

The proximate cause of much of the prosecutorial misconduct described in this article is traceable to the fundamental fault in the Supreme Court's holding in *Brady v. Maryland*,¹²⁸ a fault that has been exacerbated by the Court's formulation of the harmless error rule. Grounded upon the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution, and therefore binding in both federal and state court criminal cases,¹²⁹ *Brady* requires the prosecution to make pretrial disclosures to the defense of evidence in the possession of the prosecution including the police and government agencies. The mandatory disclosures are anything that is "exculpatory," "material," or "favorable to the defense" regarding the defendant's guilt or innocence, or potential penalties to be imposed in the event of a conviction.¹³⁰ It is a prime example of a well-meaning reform gone bad, for several reasons:

a. *The fundamental conflict of interest inherent in the Brady rule.*

The first defect is that in formulating the *Brady* rule, the Court gave the prosecution the discretion to determine, prior to trial, what evidence must be produced, even though the defense has the better vantage point to decide what is "favorable."¹³¹ The prosecution is thus called upon to make value

¹²⁸ 373 U.S. 83 (1963).

¹²⁹ *Id.* at 86.

¹³⁰ *See id.* at 87. The Supreme Court has abandoned the difference in the federal test for reversal for non-compliance with *Brady* based upon whether there was no request, a general request, or a specific request made for the exculpatory evidence that was not produced. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Some form of the *Brady* rule has been adopted in each state, though these rules are subject to a number of exceptions and refinements. GERSHMAN, *supra* note 41, §§ 5.2–5.22.

¹³¹ Imagine a professional sporting event in which one of the contestants is permitted to make the close calls—whether it was a ball or strike, whether the tennis ball was in or out, whether the tackle was offside, etc.—without oversight by an independent umpire.

As to the prosecutors' dual, competing roles—to win the case and to see that justice is done—Professor Henning has said:

The prosecutor labors under the pull of two divergent forces created by the ethical precepts. One of these forces requires an attorney to advocate passionately the government's position, while the other pushes the prosecutor to seek a result that may not be exactly what the client and the attorney

judgments that ought to be within the province of the defense lawyer. The tests for production—“favorable,” “exculpatory,” “material”—are imprecise and value laden, leaving a great deal of room for the exercise of prosecutorial judgment. In *Brady*, the Supreme Court appeared to overlook the obvious conflict of interest this doctrine creates between the prosecutor-advocate who has confidence in his indictment and wants a conviction, and the defense lawyer-advocate, who has an entirely different viewpoint and approach to the case, and wants an acquittal.

Apart from the conflicting interests, in making his determination as to production, the prosecutor cannot know the potential uses the defense lawyer may have for the evidence. What may not appear useful to the prosecutor may be useful for defense counsel. The prosecutor is exposed to the natural condition of cognitive bias, which is common to litigators on both sides of disputed cases.¹³² He is convinced in the justice of his indictment. He may never have defended a criminal case, and therefore may be unable to put himself in the defense lawyer’s position.¹³³ Justice John Paul Stevens, who

desire: a conclusion short of a criminal conviction. Therefore, at the core of a prosecutor’s function lies a potentially irreconcilable conflict between doing justice—which the ethical codes do not define—and the prosecutor’s role as the government’s primary advocate in the criminal justice system.

Henning, *supra* note 60, at 727–28.

¹³² KATHLEEN “COOKIE” RIDOLFI ET AL., *MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES* 22 (2014), <http://www.nacdl.org/report/materialindifference/pdf/>.

As to prosecutors’ potential cognitive bias and inability to evaluate the importance of evidence when seen through the eyes of the defense lawyer, see Kozinski, *supra* note 5, at xxvii (“[I]t’s not in [prosecutors] hearts to help the other side.”); David W. Ogden, *Foreword to RIDOLFI ET AL.*, *supra*, at viii (“[Prosecutors as] advocates pursuing a valid and important goal [to convict those they believe are guilty] may tend to view things through a particular lens, no matter how hard they try to get their calls right.”).

In the opinion of one of the authors, based upon his personal experience as both a former U.S. Attorney and as a defense attorney, it is obvious that even the most honorable prosecutors have a built-in conflict of interest in deciding what to produce to the defense before trial. This opinion is supported by the myriad cases of undisclosed exculpatory evidence in the Registry of Exonerations. While withholding the evidence may not be deliberate—after all, many prosecutors have never defended a criminal case and will not know what is relevant to the defense—the errors from nondisclosure are too costly and is a major reason why defense lawyers should have open access to files of prosecutors and law enforcement, subject to certain limitations. *See* discussion regarding open file discovery, *infra*.

¹³³ *United States v. Agurs*, 427 U.S. 97, 108 (1976). Professor Ridolfi made the same point in different words:

Prosecutors are ill-equipped to apply a post-trial standard to a pre-trial obligation without the benefit of the defense perspective and with their natural biases as zealous advocates. . . . Even for

was a trial lawyer before being appointed to the bench, pointed out what experienced trial lawyers know: “The significance of an item of evidence can seldom be predicted accurately until the entire record is complete[.]”¹³⁴

b. A decision not to disclose usually means the evidence will never become known to the defense lawyer or the courts.

The second flaw in the *Brady* rule is that the prosecutor is not required to advise the defense lawyer what he has deemed not exculpatory and therefore has decided not to produce, nor is he required to seek the advice of the court as to his obligation to produce. Accordingly, in the vast majority of cases, it is likely that the existence of the evidence in question will never become known to the defense or to the courts adjudicating the case.¹³⁵

c. If the evidence is discovered after conviction, the harmless error rule limits the basis for reversal.

The final irony of the *Brady* rule comes into play if, after conviction, the prosecutor’s failure to produce exculpatory evidence is disclosed. The harmless error rule—a form of which is used in all state and federal courts—then comes into play. Faced with the prosecutor’s failure to make pretrial production of exculpatory evidence, the trial or reviewing court is called upon to determine whether, in light of all the evidence, “there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different,” which means “the likelihood of a different result is great enough to undermine confidence in the outcome of the [conviction].”¹³⁶ The court imagines the trial that should have occurred, with the evidence produced to the defense, and compares it to the one that took

the most ethical prosecutor, application of the materiality standard is not done in a vacuum and rarely considers the defense perspective—the application is unfairly influenced by the prosecutor’s *theory of the case*, even if inadvertent.

RIDOLFI ET AL., *supra* note 132, at xv, 22. It is the case that many sources of authority instruct prosecutors to err on the side of disclosure. *E.g.*, *Agurs*, 427 U.S. at 108 (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure”); DOJ Memo, *supra* note 107. However, these instructions have not taken root in many prosecutorial offices. *See* Kozinski, *supra* note 5, at viii (noting “an epidemic of *Brady* violations abroad in the land”).

¹³⁴ *Agurs*, 427 U.S. at 108 (Stevens, J.).

¹³⁵ The National Registry of Exonerations includes cases in which years passed before the exculpatory evidence was discovered, although it was known to the prosecutor before trial but not produced to the defense. This has led to many exonerations after wrongfully convicted defendants have served many years of confinement. *See generally* UNIV. OF MICH. LAW SCH., *supra* note 6.

¹³⁶ *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (internal quotation marks and citations omitted); *see also* 28 U.S.C. § 2111 (2012) and FED. R. CRIM. P. 52(a).

place, with the evidence withheld. The court evaluates the differences between the two trials, one real and the other hypothetical, and reaches an opinion as to what might have resulted if the prosecutor had produced the evidence. The court is invited to ignore the prosecution’s pretrial breach of the obligation to produce exculpatory evidence and excuse the prosecutor’s failure to make exculpatory evidence available based upon a post-trial record. Thus, judges, sworn to uphold the Constitution, are called upon to apply a lesser standard of the process due to some defendants compared to others—that is, the stronger the prosecution’s case compared to the defense, the lesser value is attributed to the right of the defendant to a fair trial without regard to the relative weight of the evidence.

In the great majority of federal and state appellate rulings involving allegations about non-production of exculpatory evidence, the reviewing courts have held that the alleged *Brady* violations were harmless error. Justice Stevens called attention to the significant difference in the pretrial and post-trial tests applicable to production of exculpatory evidence:

[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.¹³⁷

Despite Justice Stevens’ suggestion that “the prudent prosecutor will resolve doubtful questions in favor of disclosure,”¹³⁸ many commentators have concluded that there are prosecutors who have treated the stringent after-the-fact “materiality” test as an invitation to narrow their pretrial disclosures—to withhold arguably exculpatory evidence at the trial level, in the expectation that if the defendant is convicted and the undisclosed evidence is discovered, the court will rule that the failure to disclose was harmless and therefore not grounds for reversal.¹³⁹ There is persuasive evidence to support this conclusion. For example, in a 2014 study of over 600 appellate decisions involving alleged violations of the prosecutor’s duty to

¹³⁷ *Agurs*, 427 U.S. at 107–08 (Stevens, J.).

¹³⁸ *Id.*

¹³⁹ *See, e.g.*, Gershman II, *supra* note 60, at 713 (“[B]y placing the burden of establishing the constitutional violation on the defendant, the Court reversed the well-settled rule that requires the beneficiary of a constitutional error—i.e., the prosecutor—to demonstrate the harmlessness of his violation. By shifting the burden, the Court afforded the prosecutor an added perverse incentive to conceal evidence.” (footnotes omitted)).

make pretrial production of exculpatory evidence to the defense, the authors concluded:

Taking cues from the way in which courts analyze *Brady* claims in the post-trial context, the prosecutor's inquiry becomes not whether a piece of information is favorable, but instead whether the information would have made a difference in the outcome of the case. The judiciary's almost unilateral focus on materiality conveys a message that non-material favorable information is unimportant and need not be disclosed. As a result, the current system of judicial review fails to promote a culture of compliance, instead fostering *Brady*, or "so-called *Brady*," violations.¹⁴⁰

In a 2013 dissent from an order denying a petition for rehearing en banc in *United States v. Olsen*, then-Chief Judge Kozinski, joined by four judges on the Ninth Circuit Court of Appeals, concluded that, "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend."¹⁴¹ After listing twenty eight reported appellate opinions involving breaches between 2003 and 2013, he concluded: "When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition."¹⁴² The court "invites prosecutors to avert their gaze from exculpatory evidence" by requiring an "impossibly high" materiality standard to be met before a conviction will be reversed.¹⁴³ Over the years, a number of legal scholars have called attention to this phenomenon.¹⁴⁴

¹⁴⁰ RIDOLFI ET AL., *supra* note 132, at 44.

¹⁴¹ *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013).

¹⁴² *Id.* at 632.

¹⁴³ *Id.* at 633. Judge Kozinski recently elaborated on these remarks, including his recommendations that trial court judges "[e]nter *Brady* compliance orders in every criminal case . . . [e]ngage in a *Brady* colloquy . . . [and a]dopt local rules that require the government to comply with its discovery obligations without the need for motions by the defense." Kozinski, *supra* note 5, at xxxiii–xxxiv (emphasis removed).

¹⁴⁴ See, e.g., Gershman II, *supra* note 60, at 727–28 ("The development of the *Brady* rule by the judiciary depicts a gradual erosion of *Brady*: from a prospective obligation on prosecutors to make timely disclosure to the defense of materially favorable evidence, to a retrospective review by an appellate court into whether the prosecutor's suppression was unduly prejudicial. The erosion of *Brady* has been accompanied by increasing prosecutorial gamesmanship in gambling that violations will not be discovered or, if discovered, will be allowed, [as well as] tactics that abet and hide evidence."); Rosen, *supra* note 51, at 707–08 ("As a consequence of the materiality standards, a prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily result in a reversal of the conviction. This is true no matter how flagrant or intentional the prosecutor's misconduct."); Leonard Sosnov, *Brady Reconstructed: An Overdue Expansion of Rights and Remedies*, 45 N.M. L. REV. 171, 190–91 ("Under this constitutional paradigm, police and prosecutors face no constitutional pressure to disclose even obviously exculpatory evidence if they believe that it will not alter the outcome of the trial. . . . It makes little sense to have a constitutional

This potential for conflating the pre- and post-trial tests for production was pointed out by the Court of Appeals of New York:

[A] backward-looking, outcome-oriented standard of review that gives dispositive weight to the strength of the People’s case clearly provides diminished incentive for the prosecutor, in first responding to discovery requests, thoroughly to review files for exculpatory material, or to err on the side of disclosure where exculpatory value is debatable.¹⁴⁵

In *Olsen*, then-Chief Judge Kozinski and his fellow judges pointed out another risk caused by using vague terminology to define prosecutors’ obligations to produce exculpatory evidence, coupled with forgiving appellate “harmless error” review: the likelihood that materials not produced at trial will never be discovered, or will come to light after the defendant has spent years in prison. The post-trial discovery of a *Brady* violation is “highly unlikely” to be discovered by any party, and “[t]his creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice.”¹⁴⁶ Another deleterious effect of the harmless error rule, as identified by Professor Gershman and relevant to all types of alleged prosecutorial misconduct, is that it “encourages the view that the courts, by condoning prosecutorial lawlessness, are themselves promoting disrespect for the law.”¹⁴⁷

Drastic adverse consequences to the fair administration of criminal justice have resulted directly from this perversion of the *Brady* rule. Professor Brandon L. Garrett, who analyzed reviewing court opinions upholding the convictions of defendants who were convicted, imprisoned, and later exonerated, found that thirty eight percent of exonerees in his study had a harmless error or “no prejudice” ruling in their post-conviction proceedings—or both.¹⁴⁸

A few years ago, Professor Alafair S. Burke analyzed over forty five years of *Brady*-related rulings. He writes:

doctrine that excuses government actors’ intentional withholding of favorable exculpatory or impeachment evidence, so long as it is not material.”).

¹⁴⁵ *People v. Vilaridi*, 555 N.E.2d 915, 920 (N.Y. 1990).

¹⁴⁶ *Olsen*, 737 F.3d at 630. Other legal scholars agree. *See, e.g.*, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 *IND. L.J.* 481, 489 (2009) (“If they [prosecutors] intentionally suppress evidence that might jeopardize a conviction, they can do so in the comfort of knowing there is little chance the evidence will ever come to light and therefore only a remote possibility of a challenge to their decision to withhold it.”).

¹⁴⁷ GERSHMAN, *supra* note 41 § 14:4.

¹⁴⁸ GARRETT, *supra* note 60, at 201.

Much of the blame for *Brady*'s failure to protect the innocent has been laid at the doors of the prosecutors charged with the doctrine's effectuation. Commentators argue that *Brady* has become a "paper tiger," frequently and blatantly disregarded by prosecutors who have come to realize that they can suppress exculpatory evidence with few repercussions other than higher rates of conviction.¹⁴⁹

After analyzing cases dealing with prosecutors' responding to defense demands for production of evidence pursuant to *Brady*, Professor Burke concludes:

The exonerations of more than two hundred criminal defendants based on post-conviction DNA evidence have forced an acknowledgement that not only our justice system convicts the innocent, but also that prosecutorial suppression of *Brady* material constitutes a leading cause of wrongful convictions. . . . [N]early half of the cases in which innocent defendants have been exonerated based on post-conviction DNA evidence involved prosecutorial misconduct, and more than a third of the misconduct involved the nondisclosure of exculpatory evidence.¹⁵⁰

The problems inherent in the harmless error rule are long standing and well known, and are not limited only to breaches of the *Brady* rule. In the real world of criminal prosecutions, reviewing court opinions that call attention to prosecutorial violations of established rules but nevertheless affirm convictions have little or no deterrent value, and in many instances have had the effect of emboldening aggressive prosecutors.¹⁵¹

Over thirty years ago, in *United States v. Hastings*,¹⁵² a majority of the Supreme Court conceded that the prosecutor's closing argument, in which the prosecutor alluded to the defendant's failure to testify, violated the defendant's constitutional rights,¹⁵³ but reversed the Seventh Circuit's order for a new trial because the majority was "satisfied beyond a reasonable doubt that the error relied upon was harmless."¹⁵⁴ In dissent, Justice Brennan, joined by Justice Marshall, made these observations, which are applicable to the many cases involving *Brady* violations that are nevertheless affirmed based on harmless error:

¹⁴⁹ Burke, *supra* note 146, at 482–83.

¹⁵⁰ *Id.* at 509–10. Professor Burke concludes, as do we, that open file discovery is the appropriate requirement for prosecutorial disclosure. *Id.* at 518–19.

¹⁵¹ See *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984), and *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1961), for exasperated warnings of appellate court judges. See also Gershman II, *supra* note 60, at 728; Rosen, *supra* note 51, at 736; Steele *supra* note 54, at 977; Yaroshefsky, *supra* note 57, at 285 n.48.

¹⁵² 461 U.S. 499 (1983).

¹⁵³ *Id.* at 506.

¹⁵⁴ *Id.* at 512.

If Government prosecutors have engaged in a pattern and practice of intentionally violating defendants' constitutional rights, a court of appeals certainly might be justified in reversing a conviction, even if the error at issue is harmless, in an effort to deter future violations . . . it is certainly arguable that the public's interest in preserving judicial integrity, and in insuring that Government prosecutors, as its agents, refrain from intentionally violating defendants' rights are stronger than its interests in upholding the conviction of a particular defendant.¹⁵⁵

The combination of the *Brady* rule's inherent lack of clarity, and potential for secret non-disclosure, coupled with the vagaries of the harmless error rule when applied to prosecutorial misconduct, have led to a great deal of needless and costly litigation, with the results often dependent, as they used to say, upon the length of the chancellor's foot.¹⁵⁶

The system needs change, now. We therefore submit the following reforms so that both the *Brady* and harmless error rules are abandoned or substantially reformulated.¹⁵⁷

- *Open file discovery.* As to *Brady*, we recommend that federal and state supreme courts and legislatures adopt rules and legislation requiring the prosecution to provide open file discovery. "Open file discovery" means making available to the defense the prosecutor's entire file and those of all investigative agencies, rather than allowing the prosecution to exercise discretion over such disclosures, without the defense counsel's knowledge or court approval. Exceptions to the prosecutor's duty to disclose may be presented by the prosecutor serving a motion on defense counsel that states that the prosecutor will present the information he wishes to be protected for an *in camera* inspection by the court without defense counsel present. Justifications for non-disclosure include matters that would: endanger witnesses from retaliation or intimidation; interfere with ongoing investigations; or result in substantial harm to an individual or the public interest.¹⁵⁸

The benefit of open file discovery is that it removes the determination of disclosure from the prosecutor after he evaluates each piece of evidence

¹⁵⁵ *Id.* at 527.

¹⁵⁶ See JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., Quaritch 1927) (1689) ("One Chancellor [has] a long foot, another [a] short foot[,], a third an indifferent foot; tis [the] same thing in [a] Chancellor's Conscience.").

¹⁵⁷ Whether or not our recommendations are adopted in the federal system, the harmless error rule is not binding upon state courts. *State v. Kaiser*, 486 N.W.2d 384, 386 (Minn. 1992). As to *Brady*, each state is authorized to call for clearer formulation and stricter enforcement of the rules for production of exculpatory evidence at every stage of criminal proceedings. *People v. Vilardi*, 555 N.E.2d 915, 919 (N.Y. 1990).

¹⁵⁸ See discussion in Burke, *supra* note 146, at 516.

or information and tests it against local discovery rules as well as *Brady* and its progeny. The process gives a substantial measure of assurance to the trial judge and defense lawyer that there has been a good faith effort to provide the defense with the government's complete file.¹⁵⁹

An open file policy is not a panacea because it will still be subject to what the prosecutor's file contains. But it should severely limit the myriad disputes that occur in both trial and reviewing courts concerning the completeness and fairness of the materials produced by the prosecution, and the necessity for retrials when the courts determine there has been inadequate disclosure. It will also protect against the scandalous delays in discovery of exculpatory evidence until years after the original trial, appeal, and imprisonment.¹⁶⁰

• *Narrow the harmless error rule.* A more stringent formulation of the harmless error rule is needed to get the attention of the relatively few prosecutors who do not adhere to the principle that their primary duty is to see that justice is done, rather than racking up a record of convictions. We recommend that if errors occur during criminal trials owing to misconduct of law enforcement personnel, including not producing exculpatory evidence, new trials should be ordered unless the court is convinced beyond a reasonable doubt that the error (1) was not due to intentional conduct on the part of law enforcement personnel, and (2) did not affect the defendant's right to a fair trial.¹⁶¹

¹⁵⁹ For excellent discussions of the need for, and positive results attained from, open-file discovery, see Burke, *supra* note 146, at 515–19; Green, *supra* note 111, at 622–82; Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1557–67 (2010); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272–76, 306–09 (2008); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1140–45 (2004).

¹⁶⁰ One of the authors, a former federal prosecutor, poses the same rhetorical question put by Professor Weeks: “What is there, after all, that argues in favor of *any* limit on disclosure by a prosecutor?” Weeks, *supra* note 60, at 913 (emphasis in original). Why, in criminal cases, with freedom and reputations at risk, is pretrial discovery not the same as in civil litigation involving disputes about monetary awards?

¹⁶¹ Similar provisions are contained in the Fairness in Disclosure of Evidence Act of 2012, a bill introduced by Senator Lisa Murkowski after dismissal of the indictment of Senator Ted Stevens. It provides that on appeal, “the reviewing court may not find an error arising from conduct not in compliance with this section to be harmless unless the United States demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained.” Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2 (2012) (amending 18 U.S.C. § 3014). See Green, *supra* note 111, at 652–54 (discussing multiple

Further, unless it is clear that the prosecutor’s misconduct was not intentional and did not affect the outcome, the court should refer the matter to disciplinary authorities, with the transgressor’s name included. These stern policies are needed to send clear messages to the few errant prosecutors that they must conform their conduct to applicable rules.

2. Federal and state supreme courts and legislatures should provide that prosecutors have qualified rather than absolute immunity from civil damage actions.

Another major impediment to inhibiting prosecutorial misconduct is the Supreme Court rule, also adopted by many states, that grants absolute immunity to prosecutors from civil damages in suits based upon their conduct undertaken in pursuance of their prosecutorial functions.¹⁶² The Supreme Court adopted this rule in its 1976 decision in *Imbler*, which held that federal and state prosecutors have absolute immunity from civil actions brought under the federal civil rights statute, 42 U.S.C. § 1983.¹⁶³ As a result, wrongfully convicted and imprisoned defendants—such as in Cleveland, Ohio,¹⁶⁴ and New Orleans, Louisiana,¹⁶⁵ both home to well-documented cases of prosecutors’ scandalous behavior and flouting of ethics rules—have no civil remedy available against their unscrupulous prosecutors.

One of the Court’s justifications for this holding is relevant to the subject of this article. After pointing out that a prosecutor may be subject to criminal prosecution under certain extreme circumstances, the Court added:

Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.¹⁶⁶

benefits of the legislation); RIDOLFI ET AL., *supra* note 132, at 50–51 (same).

¹⁶² *Imbler v. Pachtman*, 424 U.S. 409 (1976).

¹⁶³ *Id.* at 427. Absolute immunity applies when prosecutors “act[] as advocates,” performing functions intimately connected with the judicial phase of the criminal proceeding and have qualified immunity when they act as “investigators or administrators,” which requires that the civil plaintiff must defeat any criminal charges, and prove that the prosecutor violated clearly established constitutional law with a culpable state of mind. Johns, *supra* note 60, at 521.

¹⁶⁴ See Brett, *supra* note 7.

¹⁶⁵ *Connick v. Thompson*, 563 U.S. 51, 71–72 (2011).

¹⁶⁶ *Imbler*, 424 U.S. at 429.

In 2011, in a § 1983 case against a notorious state prosecutor from New Orleans, the Court overturned a multi-million dollar verdict for the victim on the basis of absolute immunity.¹⁶⁷ Justice Clarence Thomas repeated the *Imbler* reference to the prosecutor's risk of professional discipline as a deterrent from abusing his authority.¹⁶⁸

As we have shown in Part I, the Supreme Court assumes the existence of a robust disciplinary system, which is not the reality throughout the country.¹⁶⁹ In the absence of meaningful enforcement of federal and state disciplinary systems, as discussed above, there is no monetary sanction to dissuade repeat offenders or their employers. But as discussed below, many knowledgeable commentators have pointed out that prosecutorial immunity from civil liability provides an additional incentive for prosecutors to play fast and loose with their ethical obligations. They argue that serious consideration should be given to replacing absolute with qualified immunity, or alternatively completely eradicating immunity in cases of deliberate violations of defendants' rights. For example, Professor Joseph R. Weeks of Oklahoma City University School of Law writes:

Well considered arguments have been advanced to support the overruling of *Imbler*. Until this occurs, however, the conclusion for our purposes is that the prospect of a civil suit under federal law for a *Brady* violation does not exist. We will have to look elsewhere to discover the incentive for prosecutors to comply with their constitutional obligations to disclose exculpatory evidence.¹⁷⁰

Judge Kozinski added his support to this reform recently. He calls attention to the justifications for immunity asserted in the *Imbler* case—that

¹⁶⁷ *Connick*, 563 U.S. at 66–68.

¹⁶⁸ *Id.* at 66 (“An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.”).

¹⁶⁹ Zacharias, *supra* note 50, at 777 (“*Imbler v. Pachtman*’s reference to the existence of professional discipline as grounds for immunizing prosecutors from legal action and constitutional review has been repeated in subsequent cases [but] *Imbler*’s premise is not realistic. Bar authorities do not, and probably cannot, fill the void in prosecutorial oversight across the board.”).

¹⁷⁰ Weeks, *supra* note 60, at 877–78; see also Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 58–59 (2009) (“Standing alone, the disciplinary process will never adequately hold errant prosecutors accountable for their role in bringing about wrongful convictions. These conclusions belie the Supreme Court’s suggestion in *Imbler* that professional regulation serves as an effective alternative to the civil liability regime. Although enforcement can be enhanced, discipline will never come close to playing the lead role in constraining prosecutorial misconduct that the Court assigns to it.”).

prosecutors are subject to criminal prosecution for their misdeeds, as well as discipline for their misconduct.¹⁷¹ Judge Kozinski concludes, and we agree:

This argument was dubious in 1976 and is absurd today. . . . It is a disparity that can only be explained by the fact that prosecutors and judges are all part of the legal profession and it's natural enough to empathize with people who are just like you. If the Supreme Court won't overrule *Imbler* . . . Congress is free to do so by amending 42 U.S.C. § 1983.¹⁷²

As with the harmless error rule, the federal absolute immunity doctrine in § 1983 suits is based upon application of federal law, not constitutional principles, and therefore need not be followed in civil actions brought under state law. Accordingly, each state may adopt whatever version of immunity, or no immunity, shall be given to prosecutors while engaged in their official duties. Professor Margaret Z. Johns of the University of California, Davis, School of Law, has demonstrated the questionable validity of the historical rationale for granting absolute immunity to prosecutors in *Imbler*, and the difficulty in many cases of determining whether absolute or qualified immunity applies.¹⁷³ Following a comprehensive analysis of the subject, she has made a straightforward recommendation for an alternative rule—which we endorse—for adoption by state courts and legislatures, and by the Supreme Court or Congress, of qualified immunity.¹⁷⁴ Qualified immunity “would protect honest prosecutors from unwarranted litigation while

¹⁷¹ *Imbler*, 424 U.S. at 428–29 (“[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.” (footnotes omitted)).

¹⁷² Kozinski, *supra* note 5, at xxxix–xli.

¹⁷³ Johns, *supra* note 60, at 521–34.

¹⁷⁴ *Id.* at 535. See also Williams, *supra* note 60, at 3471 (“By applying absolute immunity to trial-related misconduct, the courts have again immunized prosecutors for behavior that is unethical but for which prosecutors are not often subject to disciplinary review.”). “Qualified immunity is sufficient to protect the integrity of the judicial process. Qualified immunity would continue to protect the well-intentioned prosecutor from liability, but would hold liable those who willfully violate federal statutory or constitutional rights.” *Id.* at 3480. See also RIDOLFI & POSSLEY, *supra* note 2, at 75 (“As the Supreme Court has noted in other contexts, the qualified immunity defense ‘provides ample protection to all.’” (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986))). “Qualified immunity protects government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 81 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

affording victims of deliberate prosecutorial misconduct a remedy for the willful violation of their civil rights.”¹⁷⁵

D. RECOMMENDATIONS DIRECTED TO PROSECUTORS: ADOPT AND INSTILL IN THE OFFICE A CULTURE OF INTEGRITY AND COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT

Prosecutors are heavily invested in maintaining public confidence in the criminal justice system. They have great credibility; they wear “white hats.” It is their responsibility to rid their ranks of those who sully their well-earned reputations for honorable dealing. An important recommendation, which we wholeheartedly adopt, is the creation of an office “ethical atmosphere”—a culture which emphasizes ethical values in hiring and training; provides incentives for honorable, open behavior; and disciplines those who do not follow the rules.¹⁷⁶ In his book *Prosecution Complex*, Professor Daniel S. Medwed concludes that an ethical culture is “key” to increasing the likelihood that prosecutors’ offices will carry out justice.¹⁷⁷

The Prosecution Standards of the National District Attorneys Association acknowledges the high ethical standards that bind prosecutors, describing the prosecutor’s Primary Responsibility as: “The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of truth.”¹⁷⁸

Written policies, available to the public, are a fundamental starting point.¹⁷⁹ Continuing education programs are also essential, particularly for newly-hired assistants.¹⁸⁰

¹⁷⁵ *Id.*

¹⁷⁶ This has been emphasized by a number of writers. *See, e.g.*, Joy, *supra* note 60, at 424 (“Implementing internal policies that value ethical conduct, and implementing and enforcing internal discipline when those norms are violated, would go a long way toward addressing the issue of prosecutorial misconduct.”).

¹⁷⁷ DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 170* (2011) (“In the end, maintaining an ethical culture within prosecutors’ offices is the key to enhancing the likelihood that justice will prevail. . . . Instead of emphasizing the black letter of legal doctrine and the techniques of advocacy above all, a premium should be placed on ethics and the importance of empathizing with clients as well as adversaries.”); *see also* Medwed, *supra* note 159, at 1566–67.

¹⁷⁸ NAT’L PROSECUTION STANDARDS, *supra* note 82 § 1-1.1.

¹⁷⁹ For example, the U.S. Department of Justice adopted a detailed memorandum for Department prosecutors regarding procedures to be followed relating to discovery in criminal cases. *See* DOJ Memo, *supra* note 107; *see also* Kirchmeier et al., *supra* note 60, at 1365–69.

¹⁸⁰ Genson & Martin, *supra* note 60, at 59 (“It is incumbent upon the office of the

Prosecutorial conduct that appears to violate Professional Rule 3.8(f) is commonly not sanctioned or even questioned by disciplinary authorities. That rule provides that prosecutors in criminal cases shall:

[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused[.]¹⁸¹

The violations routinely include “perp walks,” in which defendants, most of whom are not flight risks, are paraded in handcuffs as they are led by law enforcement officers to the courthouse for fingerprinting and arraignment. These media spectacles are often followed by press conferences in which grim-faced, self-congratulatory prosecutors outline their evidence and depict the defendants in prejudicial terms. Rarely is any mention made that the defendants are presumed to be innocent, and that the prosecution has the burden of proving the defendants’ guilt beyond a reasonable doubt in court.¹⁸² Top law enforcement lawyers in both the federal and state systems often piously and publicly declaim unproven charges, with no questions raised about their apparent violations of the applicable rules of professional conduct.

American Bar Association Formal Opinion 467 deals with the responsibilities of supervisory personnel in prosecutors’ offices, including a supervisor’s potential vicarious liability for subordinates’ misconduct that the supervisor orders, ratifies, or fails to remedy.¹⁸³ The opinion recommends training in the professional rules applicable to prosecutors, as well as staying advised of and requiring periodic reports on pending cases.¹⁸⁴ Internal office discipline does not relieve state and federal prosecutors of their duty to report

prosecutor to implement mandatory continuing education programs designed to educate its attorneys about prosecutorial misconduct. Such programs could feature lectures by judges, veteran prosecutors, disciplinary authorities, and others active in the field of professional responsibility.”)

¹⁸¹ MODEL RULES OF PROF’L CONDUCT r. 3.8(f) (2009); *see also id.* r. 3.6 (restricting trial publicity by both the prosecution and defense).

¹⁸² *See, e.g.,* Rick Rojas, *25 Charged in Heroin Trafficking Ring in Brooklyn*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/nyregion/25-charged-in-heroin-trafficking-ring-in-brooklyn.html?_r=0; *Transcript: Justice Department Briefing on Blagojevich Investigation*, N.Y. TIMES (Dec. 9, 2008), <http://www.nytimes.com/2008/12/09/us/politics/09text-illinois.html?pagewanted=all>.

¹⁸³ ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 14-467 (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_467.pdf.

¹⁸⁴ *Id.*

evidence of serious lawyer misconduct to local disciplinary authorities, pursuant to the rules set out in Part II above. They may be reluctant to report friends and colleagues,¹⁸⁵ but these professional obligations accompany their law licenses and public positions. Prosecutors' reporting responsibilities are set out in the National Prosecution Standards of the National District Attorneys Association:

1-1.6 Duty to Respond to Misconduct: A prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice:

...

c. If despite a prosecutor's best efforts, no action is taken in accordance with the prior procedures to remedy the misconduct [by reporting within the prosecutor's own office, see §§ a and b], a prosecutor should report the misconduct to appropriate officials outside the prosecutor's office (to the extent permitted by the law and rules of ethical conduct of the state).

d. A prosecutor's failure to report known misconduct may itself constitute a violation of the prosecutor's professional duties.¹⁸⁶

E. RECOMMENDATIONS DIRECTED TO DEFENSE LAWYERS

As noted in Part II above, defense lawyers are required to report serious violations of the Professional Rules by other lawyers, including prosecutors and fellow defense lawyers, regardless of how distasteful this may be. And, as demonstrated in Part II.D, failure to report when required may itself be a violation of the rules.

In the materials cited in Part I, we have discussed the difficulties many defense lawyers have in obtaining full pretrial disclosure from prosecutors. There are ways to alleviate this problem.

¹⁸⁵ Keenan et al., *supra* note 59, at 210–11. *See generally* Steele, *supra* note 54, at 978–79 (arguing that it is hard for defense attorneys and judges to report prosecutors due to fear of retaliation or other consequences); Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 426 (2011) (same).

¹⁸⁶ NAT'L PROSECUTION STANDARDS, *supra* note 82 § 1-1.6. This warning echoes the judicial rulings cited in Part II.D above. It is applicable as well to judges, law clerks, and defense lawyers who have knowledge of other lawyers' misconduct. Those who represent the accused are an integral part of the criminal justice system. They too have serious ethical and professional duties, not only to their clients, but also to the system. They are required and expected to comply with their obligations imposed by the Rules of Professional Conduct, including those relating to candor to the tribunal, fairness to opposing parties and counsel, impartiality and decorum to the tribunal, trial publicity truthfulness, and maintaining the integrity of the profession. Under Rule 8.3 they must report serious misconduct by both prosecutors and fellow defense lawyers. *See* PROFESSIONAL RULES r. 8.3.

First, a pretrial motion asking the trial court to enter an order requiring the prosecution to comply with the holdings of the Supreme Court in *Brady v. Maryland*¹⁸⁷ and *Giglio v. United States* could address this problem, as two experts have suggested.¹⁸⁸

File a pretrial motion that tracks and cites the relevant ethical rule of the defense attorney's jurisdiction or in the case of federal prosecutors, the rule that applies to the state where the prosecutor is based and/or governs the federal proceeding. Ask for an order that the prosecutor search her file for information that "tends to negate the guilt of the accused or mitigates the offense . . ." [T]he motion should ask for an order that clearly states that "willful and deliberate failure to comply" is punishable by contempt.¹⁸⁹

In advancing this idea, Professor Barry Scheck and Judge Nancy Gertner point out that this form of motion would create a remedy for defense counsel if a prosecutor does something to merit sanctioning, by violating the judge's order.¹⁹⁰

Second, a recently published article recommends defense lawyers request the trial judge to engage in a *Brady* colloquy even in cases where a defendant intends to plead guilty.¹⁹¹ In this scenario:

[T]he court should ask the prosecutor a handful of questions on the record to investigate whether the prosecutor possesses evidence favorable to the defendant that has not been disclosed. If the court refuses to propound the questions, the defense attorney should offer an affirmation on the record about what material she requested of the prosecutor and what, if anything, she received in response. The defense attorney should then invite the prosecutor to correct any misstatements about the prosecution's response to the defendant's *Brady* request.¹⁹²

Professor Jason Kreag concludes that this procedure would increase the judge's role in the prosecution's disclosure decisions, urge compliance with *Brady*'s mandate, encourage robust defense preparations, and increase the likelihood of penalties for prosecutorial wrongdoing.¹⁹³ He observes that this

¹⁸⁷ 373 U.S. 83, 87 (1963).

¹⁸⁸ 405 U.S. 150, 154 (1972) (holding that promises of leniency made to government witnesses must also be disclosed).

¹⁸⁹ Barry Scheck & Nancy Gertner, *Combatting Brady Violations With an "Ethical Rule" Order for the Disclosure of Favorable Evidence*, 37 CHAMPION 40, 40–41 (2013), WestlawNext, 37-MAY Champion 40.

¹⁹⁰ *Id.* at 44.

¹⁹¹ Jason Kreag, *The Brady Colloquy*, 67 STAN. L. REV. ONLINE 47, 50–52 (2014).

¹⁹² *Id.* at 49.

¹⁹³ *Id.* at 50.

recommendation “could be implemented today, without passing legislation, changing the ethical rules, or giving judges additional authority.”¹⁹⁴

Third, in 2004, the prestigious American College of Trial Lawyers (ACTL) made several proposals for amendments to the Federal Rules of Criminal Procedure relating to pretrial disclosure of favorable information by the prosecution to the defense.¹⁹⁵ The ACTL recounted the failures of many prosecutors to comply with their obligations under the *Brady* case and its counterpart, Rule 16(a)(E) of the Federal Rules of Criminal Procedure, which requires, “[u]pon a defendant’s request,” the production of items within the government’s possession that are “material to preparing the defense.”¹⁹⁶ The ACTL argued that prosecutors had inconsistent interpretations of Rule 16(a)(E) and *Brady*, and many failed to produce relevant, helpful information, and documents in a timely manner—if at all.¹⁹⁷ The ACTL called attention to the incongruity in discovery practice between civil and criminal rules applicable in many jurisdictions:

It is anomalous that in civil cases, where generally only money is at stake, access to information is assured; while, on the contrary, in criminal cases, where liberty is at issue, the defense is provided far less information. More significantly, in civil cases violation of the discovery rules is punishable in extreme cases by dismissal; no comparable sanction exists in criminal cases.¹⁹⁸

Here we advocate a combination of these three proposals, namely, that in both federal and state criminal cases, defense lawyers should present a written motion shortly after arraignment requesting an order requiring the prosecution to disclose in writing all information favorable to the defendant that is known to the prosecutors or to any agents or law enforcement officers. Information favorable to the defendant should include all information in whatever form—whether admissible or not—that tends to: (1) exculpate the defendant; (2) adversely impact the credibility of the prosecution’s witnesses or evidence; or (3) mitigate the offense or punishment. The motion should request that the lead prosecutor certify, in writing, that he: (1) has exercised due diligence in locating the requested information; (2) has disclosed all such information to the defense; (3) is aware of his continued obligation to disclose all requested information; and (4) will seek out and furnish any additional

¹⁹⁴ *Id.* at 56.

¹⁹⁵ American College of Trial Lawyers, *Proposal: Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 104 (2004) [hereinafter American College].

¹⁹⁶ FED. R. CRIM. P. 16(a)(E).

¹⁹⁷ American College, *supra* note 195, at 94.

¹⁹⁸ *Id.* at 104.

information favorable to the defense immediately upon it becoming known to him.

F. RECOMMENDATIONS DIRECTED TO STATE AND FEDERAL DISCIPLINARY AUTHORITIES

1. State disciplinary authorities should accept and act promptly upon complaints concerning the conduct of lawyers in criminal cases.

In most states, the primary responsibility for discipline of lawyers is vested in a commission, often acting under the state supreme court. The Louisiana Chief Disciplinary Counsel observed the importance of the disciplinary function to the legal profession:

Self regulation [sic] is no myth. It is at the core of a viable legal profession. The duty to report ethical misconduct rests within the nucleus of that core, often hidden from view but as real as are the consequences should we fail; for if we do, “we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.”¹⁹⁹

But it is clear that during the past four decades, state bar disciplinary authorities have not adequately ferreted out and taken action regarding prosecutorial misconduct, even in cases in which courts have cited the provisions of codes violated, and occasionally publicly identified the perpetrators.²⁰⁰ One author put it succinctly: “The lack of oversight and accountability for prosecutorial misconduct needs to be addressed by anyone interested in remedying prosecutorial misconduct as a factor contributing to wrongful convictions. A more proactive approach is needed.”²⁰¹

The widespread failure to discipline prosecutors who engage in misconduct results in large part from judges and lawyers not reporting violations, a shortage of disciplinary agency resources, and administrators’ lack of experience with the criminal justice system. An obvious starting point

¹⁹⁹ Charles B. Plattsmier, *Self Regulation and the Duty to Report Misconduct: Myth or Mainstay?*, 2007 PROF. LAW. SYMP. ISSUES 41, 45 (citing *In re Riehlmann*, 891 So. 2d 1239, 1249 (La. 2005)).

²⁰⁰ Davis, *supra* note 58, at 291 (“The current process has proven totally ineffective in sanctioning prosecutors who engage in misconduct.”); Keenan et al., *supra* note 59, at 245 (“[T]he ethics rules governing prosecutorial behavior need to be expanded and strengthened, and the disciplinary procedures tasked with enforcing them reformed, if our legal system is to justifiably rely on professional sanctions to deter prosecutorial misconduct.”); Kirchmeier et al., *supra* note 60, at 1381–85 (introducing five proposals for reform). These articles contain thoughtful recommendations for reform of disciplinary processes.

²⁰¹ Joy, *supra* note 60, at 427.

toward a solution is adherence by trial and reviewing courts, prosecutors, and defense lawyers to the reporting requirements of the applicable rules. But that is only a first step. Even when reporting is handled as required by the rules, the system will continue to lack relevance to criminal practitioners and the judges who handle the cases if the disciplinary agencies do not act promptly.

The disciplinary process should begin with a careful investigation of the facts, which will often be found in the trial or reviewing court record. If warranted, written charges should be filed, followed promptly by hearings, and imposition of appropriate disciplinary sanctions on those found to be knowingly involved in violations of ethical standards.²⁰² It is also important that sanctions be reported in bar association and other publications, with the offenders' names and positions disclosed.

Another recommendation made by several authors, which may already be in place in some jurisdictions and with which we concur, is that disciplinary authorities review judicial opinions and media for references to lawyer misconduct.²⁰³ Further, as noted above, there should be in place in each jurisdiction a process for publication of the names of those found to have transgressed the rules of professional conduct, as well as court-created electronic databases to receive and store reports of lawyer misconduct from judges.²⁰⁴

²⁰² See Joy, *supra* note 60, at 424; Rosen, *supra* note 51, at 736; Zacharias, *supra* note 50, at 771–78.

²⁰³ See Alschuler, *supra* note 50, at 671; Rosen, *supra* note 51, at 735–36; Yaroshefsky, *supra* note 57, at 275, 298.

²⁰⁴ McGinniss, *supra* note 58, at 37. In its Report and Recommendations on Reporting Misconduct, the California Commission On the Fair Administration of Justice stated: “The Commission concluded it would also be useful to maintain a county-wide track record, so particular offices that may have a high rate of prosecutorial misconduct . . . can be identified.” CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON REPORTING MISCONDUCT 14 (2007) [hereinafter CAL. COMMISSION REPORT], <http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf>. The Commission specified instances of reportable misconduct by judges with personal knowledge, including: willful misrepresentation to a court, willful and in bad faith withholding or suppressing exculpatory evidence which is constitutionally required to be disclosed, and willful presentation of perjured testimony. *Id.* at 26–27.

2. *Consideration should be given to establishing separate disciplinary boards to handle complaints involving the conduct of lawyers in criminal cases.*

A number of commentators have suggested that, because many lawyers have no experience in the criminal area, separate disciplinary commissions be established to handle allegations of attorney misconduct in criminal cases, staffed by people experienced in criminal practice, such as retired judges who have presided over criminal cases.²⁰⁵ The commission members' experiences would be helpful in understanding the practice of criminal law in the jurisdiction, including "the unique web of discretionary decisions by prosecutors."²⁰⁶

We recommend that this proposal be given serious consideration.

3. *The United States Attorney General should appoint the Office of the Inspector General, in place of the Office of Professional Responsibility, to investigate and report on allegations of misconduct by federal prosecutors.*

This recommendation is directed to the current federal DOJ disciplinary process. We arrived at this conclusion after much consideration, based upon the following information and analysis.

a. *The DOJ Office of Professional Responsibility.*

The lawyers who serve in OPR are appointed by the Attorney General. Relevant to the subject of this article, OPR's function is to review and investigate allegations of misconduct by Assistant United States Attorneys and Criminal Division lawyers that relate to their authority to "investigate, litigate or provide legal advice"; to report its findings and conclusions to the Attorney General and other appropriate DOJ officials; and to serve as DOJ's contact with state bar disciplinary organizations.²⁰⁷ If OPR finds misconduct, the Professional Misconduct Review Unit (PMRU) reviews the file and adjudicates the matter.²⁰⁸ If PMRU determines that OPR's finding is supported by the evidence, it makes a disciplinary recommendation.²⁰⁹ There

²⁰⁵ See Davis, *supra* note 94 at 463–64; see also Kirchmeier, et al., *supra* note 60, at 1370–71; Yaroshefsky, *supra* note 57, at 296–98.

²⁰⁶ MEDWED, *supra* note 177, at 33.

²⁰⁷ Memorandum from Att'y Gen. Eric Holder to all United States Attorneys, et al., Re: Creation of the Prof'l Misconduct Review Unit 2 (Jan. 14, 2011), <http://www.justice.gov/opa/documents/pmru-creation.pdf>.

²⁰⁸ Established in Jan. 2011 as an additional level of review within DOJ. *Id.* at 1.

²⁰⁹ *Id.* at 2–3.

are further appeals provided from PMRU's decision.²¹⁰ When the disciplinary process is final, OPR notifies state bar associations of misconduct findings that have been upheld and that involve the violation of a state bar rule.²¹¹ OPR's annual reports contain summaries of its investigations, with general descriptions of the alleged misconduct, but lack specifics, such as the identities of the persons or courts involved, dates, locations, and other factual detail.

b. The DOJ Office of Inspector General (OIG).

During the past several years, criticisms of OPR's performance have come from a number of sources, together with calls for transfer of the oversight of prosecutors to OIG. While the OIG is a part of DOJ, it functions independently, under the Inspector General Act of 1978.²¹² OIG is responsible for investigating allegations of DOJ employee misconduct, with a single exception—misconduct allegations involving federal prosecutors, which are handled by OPR.²¹³ This exception has created friction between the Attorney General and DOJ's Inspector General, who for several years has requested that jurisdiction over misconduct allegations concerning federal

²¹⁰ *Id.* at 3.

²¹¹ This can be and often is a drawn out process, which is terminated if a subject of the inquiry leaves government service. A highly publicized example of an extended process involves the DOJ lawyers alleged to have engaged in misconduct which led to dismissal of the indictment against Senator Ted Stevens. In 2009, OPR found reckless misconduct as to two lawyers. *Goeke v. Dep't of Justice*, 2015 M.S.P.B. 1, 2 (2015). PMRU concurred and imposed 15- and 45-day suspensions. *Id.* at 3. On appeal, an Administrative Law Judge (ALJ) reversed PMRU, owing to an improper change of PMRU lawyers during review. *Id.* at 3–4. In January 2015, a Merit Systems Protection Board affirmed the ALJ's dismissal, and cancelled the suspensions. *Id.* at 15–16. After analyzing the facts and applicable law, the Board stated:

It may seem at first glance to defy common sense not to subject individuals engaged in what was characterized as reckless behavior to disciplinary action, especially when that behavior so publicly compromised the justice system with the consequence of interfering with the electoral process. However, the fact remains that the Department of Justice voluntarily created and adopted a disciplinary process not required by any external law, rule, or regulation, and allowed that process to evolve in practice over time.

Id. at 15. Commenting on this result, Alaska Senator Lisa Murkowski released a statement, saying: "These two attorneys committed serious misconduct in one of the highest profile cases in a generation. When the Justice Department tried to discipline them, it botched its own process. This deplorable development undercuts the faith Alaskans may still have in the justice system." Dermot Cole, *Murkowski "Aghast" at Rejected Suspensions for Stevens Prosecutors*, ALASKA DISPATCH NEWS (Jan. 15, 2015), <http://www.adn.com/article/20150115/murkowski-aghast-rejected-suspensions-stevens-prosecutors>.

²¹² 5 U.S.C. APP. §§ 2, 3 (2012).

²¹³ *Id.* § 8E(b)(3); 28 C.F.R. 0.29e(a) (2014).

prosecutors be transferred to OIG.²¹⁴ The Attorney General has opposed the change. Here is an abbreviated summary of OIG’s recent public statements and writings on the subject:

The Inspector General appeared before a Senate Committee on Homeland Security and Governmental Affairs on July 11, 2007.²¹⁵ His written statement²¹⁶ included a lengthy explanation of OIG’s position, in which he noted that, unlike all other OIGs throughout the federal government, DOJ’s OIG does not have complete jurisdiction throughout the agency.²¹⁷ This limitation prevents OIG from investigating misconduct allegations involving DOJ attorneys’ actions, and instead assigns this responsibility to the OPR, an entity that is not statutorily independent and reports directly to the Attorney General and his Deputy.²¹⁸ This creates a conflict of interest in OPR, and contravenes the rationale for establishing independent Inspectors General.²¹⁹ OIG operates transparently, while OPR operates in secret; OPR’s reports, even when they examine matters of significant public interest, are not publicly released.²²⁰ OIG has the means and expertise to investigate attorneys’ conduct, as is done in all other government agencies.²²¹ The current limitation of the DOJ OIG’s jurisdiction is inappropriate, violates the spirit of the OIG Act, and should be changed.²²²

In the OIG’s December 2013 and November 2014 reports to the Attorney General, the IG repeated his objections to the “carve out” of DOJ litigators from OIG’s jurisdiction and called upon Congress to eliminate this exception from OIG’s investigatory jurisdiction.²²³

²¹⁴ *Strengthening the Unique Role of the Nation’s Inspectors General: Hearing before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 110th Cong. 27 (2007).

²¹⁵ *Id.* at 12–15 (testimony of Glenn A. Fine, Inspector Gen., United States Dept. of Justice).

²¹⁶ *Id.* at 39.

²¹⁷ *Id.* at 50–51.

²¹⁸ *Id.* at 51.

²¹⁹ *Id.* at 14.

²²⁰ *Id.* at 15.

²²¹ *Id.* at 14.

²²² *Id.* at 15.

²²³ OFF. OF THE INSPECTOR GEN., *Top Management and Performance Challenges Facing the Department of Justice—2014*, U.S. DEP’T OF JUSTICE (Nov. 10, 2014), <https://oig.justice.gov/challenges/2014.htm>; OFF. OF THE INSPECTOR GEN., *Top Management and Performance Challenges Facing the Department of Justice—2013*, U.S. DEP’T OF JUSTICE (Dec. 20, 2013), <https://oig.justice.gov/challenges/2013.htm>.

c. The Government Accountability Office (GAO).

In December 2014, the GAO issued a report entitled *Professional Misconduct: DOJ Could Strengthen Procedures For Disciplining Its Attorneys*. GAO explained it issued the report because federal lawmakers had inquired about the independence and transparency of DOJ's misconduct review and disciplinary procedures.²²⁴ Members of Congress and other stakeholders argued that the lack of transparency surrounding DOJ processes for investigating misconduct and disciplining prevents attorneys from being held publicly accountable.²²⁵ Congress mandated in its 2013 fiscal year budget for the department that the GAO review and report on prosecutorial discipline in the department.²²⁶

The GAO report identifies deficiencies in OPR's performance, such as the time taken to complete investigations and the lack of documentation of the final action in several cases.²²⁷ GAO's conclusions include the following: "[U]ntil DOJ consistently ensures that all attorneys found to have engaged in misconduct are appropriately disciplined, DOJ cannot effectively address violations of professional standards."²²⁸

d. The American Bar Association (ABA).

In August 2010, the ABA House of Delegates approved a recommendation directed to DOJ to (inter alia) make public "as much information . . . as possible" from completed investigations.²²⁹ A report attached to the resolution noted:

In recent years, however, too little public disclosure has been made regarding OPR's investigations and the DOJ disciplinary determinations predicated on them in cases involving alleged professional misconduct. . . . The non-public nature of DOJ's disciplinary determinations deprives the public of information about prosecutors . . . who are alleged to have engaged in acts that warrant discipline and about how DOJ

²²⁴ GOVERNMENT ACCOUNTABILITY OFFICE, *PROFESSIONAL MISCONDUCT: DOJ COULD STRENGTHEN FOR DISCIPLINING ITS ATTORNEYS 2-3* (2014), <http://www.gao.gov/assets/670/667407.pdf>.

²²⁵ *Id.* at 11.

²²⁶ *Id.* at 2-3.

²²⁷ *Id.* at 15, 25-26.

²²⁸ *Id.* at 37-38.

²²⁹ AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES, *RECOMMENDATION* (2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100a.aucthecheckdam.pdf>.

responds in such cases. . . . [N]ondisclosure is not justified merely because public officials might be embarrassed by disclosures.²³⁰

e. The Project on Government Oversight (POGO).

POGO, a “nonpartisan independent watchdog” organization that for several decades has investigated government functions,²³¹ recommended improvements and reforms after a review of OPR reports for fiscal years 2002 through 2013.²³² Its report criticized OPR’s failure to make public the names of DOJ lawyers who acted improperly, concluding that this insulates OPR “from meaningful public scrutiny and accountability,”²³³ and that such secrecy has “fueled suspicions” that DOJ does not aggressively punish attorney misconduct.²³⁴ POGO noted that even OPR’s longstanding lead lawyer said publicly in 2007 that OIG is “a quick and efficient office” and that “given the ‘arguable ineffectiveness or limited effectiveness of the current [OPR],’ the OIG should take over.”²³⁵ POGO called for the DOJ OIG to be granted authority to investigate misconduct throughout the department, just like all other agency OIGs: “It’s time to end this wrong-headed exception and to create more independent oversight of and accountability for DOJ attorneys.”²³⁶

f. Federal courts.

In *United States v. Bowen*, Judge Engelhardt of the Eastern District of Louisiana questioned the quality of OPR’s investigation of prosecutors’ conduct:

Although in the case of Perricone and now Mann, the usual DOJ protocol appears to require simply placing the matter in the hands of the DOJ’s OPR, such a plan at this point seems useless. First of all, having the DOJ investigate itself will likely only yield a delayed yet unconvincing result in which no confidence can rest. If no wrongdoing is uncovered, it will come as a surprise to no one given the conflict of interest existing between the investigator and the investigated. Moreover, the Perricone matter has been

²³⁰ *Id.* at REPORT 1–3.

²³¹ *About POGO*, PROJECT ON GOV’T OVERSIGHT, <http://www.pogo.org/about/> (last visited Nov. 4, 2015).

²³² PROJECT ON GOV’T OVERSIGHT, HUNDREDS OF JUSTICE DEPARTMENT ATTORNEYS VIOLATED PROFESSIONAL RULES LAWS, OR ETHICAL STANDARDS 2 (2014).

²³³ *Id.*

²³⁴ *Id.* at 16.

²³⁵ *Id.* at 17 (quoting Ari Shapiro, *Ex-Chief Calls for Scrapping Justice Dept. Watchdog*, NAT’L PUB. RADIO (June 1, 2007), <http://www.npr.org/templates/story/story.php?storyId=10634336>).

²³⁶ *Id.* at 18.

under investigation for *eight months* (since March), and yet it comes as a complete surprise to everyone at DOJ and the U.S. Attorney's Office that another "poster" exists, especially one maintaining as high a position in the U.S. Attorney's Office. It is difficult to imagine how this could possibly have been missed by OPR, and surely raises concerns about the capabilities and adequacy of DOJ's investigatory techniques as exercised through OPR. In any event, the Court has little confidence that OPR will fully investigate and come to conclusions with anywhere near the efficiency and certainty offered by suitable court-approved independent counsel. The Court **strongly** urges DOJ to do so post haste. Should DOJ determine not to proceed accordingly, the Court is left to proceed as it sees fit.²³⁷

The Fifth Circuit Court of Appeals joined the District Court's criticism of the DOJ's response to the prosecutor's misconduct:

Perricone and Jan Mann both resigned from office with benefits as far as the record shows, although they were referred for professional discipline to the State Bar of Louisiana. Dobinski remains in federal employment with only a bare reproof for her online commenting. Their misdeeds are compounded by the government's insouciant investigation, which leaves open only three inferences concerning this prosecutorial breakdown: the government is not serious about controlling extracurricular, employment-related online commenting by its officials; the government feared what it might uncover by a thorough and timely investigation; or the government's investigation was incompetent.²³⁸

Even the dissenting judge could not help but be appalled at the misconduct.²³⁹

g. Law review articles.

Scholars' and experts' critiques of OPR's performance have appeared in law journals for more than a decade.²⁴⁰

²³⁷ 969 F. Supp. 2d 518, 537 (E.D. La. 2012) (emphasis in original) (footnote omitted), *aff'd*, No. 13-31078, 2015 WL 4925029 at *19 (5th Cir. Aug. 18, 2015); *accord* Kozinski, *supra* note 5, at xxxii ("In my experience, the U. S. Justice Department's Office of Professional Responsibility (OPR) seems to view its mission as cleaning up the reputation of prosecutors who have gotten themselves into trouble.").

²³⁸ *United States v. Bowen*, 799 F.3d 336, 358 (5th Cir. 2015).

²³⁹ *Id.* at 365 ("The government attorneys acted deplorably in this case, and their punishment has been unconscionably mild.").

²⁴⁰ See Davis, *supra* note 58, at 294–96; Green, *supra* note 54, at 85–87; Bruce A. Green, *Regulating Federal Prosecutors: Let There Be Light*, 118 YALE L.J. POCKET PART 156, 157–60 (1996); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 421–22 (1996); Lyn M. Morton, *Seeking the Elusive Remedy for Professional Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS, 1083, 1109–11 (1994); Williams, *supra* note 60, at 3474–75; Zacharias & Green, *supra* note 170, at 16 n.75.

h. Conclusion.

In light of the above, we agree that there exists an appearance that lawyers who serve in OPR and the PMRU are neither independent nor unbiased, and therefore should not be responsible for oversight of the conduct of federal prosecutors. We take this position being aware that the appearance may not reflect reality. But whatever the facts, OPR lawyers are obviously saddled with the appearance of conflicts of interest. In contrast, the IG functions without those conflicts, and has a reputation for independence.²⁴¹

Accordingly, we recommend that Congress or the Attorney General take the necessary steps to delegate to the OIG the responsibility for investigating and reporting on allegations of misconduct by federal prosecutors, as embodied in a recently-introduced bill to amend the Inspector General Act of 1978.²⁴²

G. RECOMMENDATIONS DIRECTED TO FEDERAL AND STATE ORGANIZATIONS WHICH PROMULGATE CODES OF PROFESSIONAL AND JUDICIAL CONDUCT

This recommendation is addressed to the federal and state supreme courts, and other entities that recommend and draft rules relating to judicial and lawyer conduct. To insure that all lawyers and judges, state and federal, are required to report their knowledge of serious lawyer misconduct, we recommend and urge that, to the extent necessary, the applicable codes be written to mandate the reporting of serious lawyer misconduct to disciplinary authorities as follows:

(1) For state court lawyers and federal prosecutors. We recommend that every state supreme court that has not already done so²⁴³ adopt the Model Rules of Professional Conduct, including Rule 8.3 as written, with the mandatory “shall.”

(2) For state court judges. We recommend that every state supreme court that has not already done so²⁴⁴ adopt the Model Revised Judicial Code with the mandatory word “shall.”

²⁴¹ This is dramatically illustrated by the Inspector General’s repeated, direct confrontations with the Attorney General over replacing OPR with OIG to investigate federal prosecutors. *See supra* notes 214–222 and accompanying text.

²⁴² Inspector General Access Act of 2015, S. 618, 114th Cong. (2015) (eliminating a provision of the original Act that requires referral of allegations of misconduct involving DOJ personnel to the OPR, thus allowing the DOJ IG to investigate those allegations).

²⁴³ *See* Appendix, § 1, *infra*, for a list of these states.

²⁴⁴ *See* Appendix, § 2, *infra*, for a list of these states.

(3) For federal judges. We recommend the Federal Judicial Conference provide for mandatory reporting to both the Department of Justice and the local state disciplinary body. We use the word “mandatory” to ensure that reporting be required rather than permissive. We believe it best if the Conference uses Judicial Code Rule 2.15²⁴⁵ as written for all federal courts.

(4) Several commentators have recommended the creation of specific ethical rules for prosecutors that reflect their unique role as both advocates and seekers of justice.²⁴⁶ Prosecutors have broad discretion whether to prosecute, and are often faced with difficult choices regarding whether to indict or decline prosecution, especially in cases that achieve public notoriety or those in which evidence of guilt does not reach the standard of proof beyond reasonable doubt. Suggestions for the formulation of standards with greater specificity, and clearer ethical rules, are contained in several thoughtful law review articles.²⁴⁷ We recommend they be given serious consideration by national and state supreme courts and bar associations.

H. RECOMMENDATIONS DIRECTED TO NATIONAL, STATE, AND LOCAL ORGANIZATIONS THAT REPRESENT JUDGES, PROSECUTORS, AND DEFENSE LAWYERS

This recommendation is directed to organizations, state and federal, local and national, that represent prosecutors, defense lawyers, bar disciplinary bodies, and the profession in general.²⁴⁸ These highly-respected organizations are well-positioned to advocate for cultures of integrity, for the adoption of written policies, and for compliance with the Professional Rules and Judicial Code. Their publications and training should emphasize the responsibilities of prosecutors and defense lawyers—line assistants as well as supervisors—to comply with the standards of the legal profession, and the obligation to report to disciplinary authorities when they become aware of serious misconduct on the part of their peers.

²⁴⁵ JUDICIAL CODE Canon 2, r. 2.15(B).

²⁴⁶ Joy *supra* note 60, at 418–420; Williams, *supra* note 60, at 3478–79.

²⁴⁷ *E.g.*, Joy *supra* note 60, at 418–420; Williams, *supra* note 60, at 3478–79.

²⁴⁸ To name a few examples: the American Bar Association, state bar associations, the National Center for State Courts, the Federal Bar Association, the National Bar Association, the National Organization of Bar Counsel, the National District Attorneys Association, the National Association of Criminal Defense Lawyers, and the American Judicature Society.

I. RECOMMENDATIONS DIRECTED TO LAW SCHOOLS

In many areas, especially in populous cities, the criminal practice is divided between lawyers who handle “white collar” cases for wealthy corporations and individuals (or lesser offenses for their relations) who are able to pay substantial hourly rates, and those who serve in public defender offices representing indigent defendants, who make up the population of most criminal defendants.²⁴⁹ Accordingly, we have included recommendations directed to the nation’s law schools. We concur with Professor John M. Levy’s statement from years ago:

The significance of teaching professional responsibility in law school should be more than merely to enlarge the meaning of “thinking like a lawyer” to include the ability to spot and analyze ethical issues. In educating students to be professionals, the law school has an impact on how the person will ultimately behave in that role.²⁵⁰

Lara A. Bazelon, a professor at Loyola Law School in Los Angeles, has written a provocative article about the value of law school clinics to prepare students for criminal practice.²⁵¹ She includes thought-provoking examples of lawyer misconduct in criminal cases, and the dilemmas posed by the rules that require reporting professional misconduct.²⁵² In the article, Professor Bazelon argues that a significant portion of misconduct in criminal cases is the product of poor or negligible training, especially in the intricacies of the practice of criminal law.²⁵³ Her discussion calls to mind the remarks of Justice Ruth Bader Ginsburg, dissenting in *Connick v. Thompson*: “One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.”²⁵⁴ The Justice was referring to the situation in Louisiana, but the remark undoubtedly applies to other states as well.

²⁴⁹ See, e.g., CAROLINE WOLF HARLOW, *DEFENSE COUNSEL IN CRIMINAL CASES 1* (2000) (reporting that, in 1996, 82% of felony defendants in the seventy-five largest counties were represented by public defenders or appointed counsel).

²⁵⁰ Levy, *supra* note 100, at 99. In 2007, the California Commission on the Fair Administration of Justice recommended “that law school courses in legal ethics and continuing ethics education programs in legal ethics for prosecutors, defense lawyers and judges include familiarity with the obligations to report misconduct and incompetent representation by lawyers . . . to the California State Bar.” CAL. COMMISSION REPORT, *supra* note 204, at 29. In 1970, an ABA Special Committee recommended: “The individual attorney’s responsibility to report instances of misconduct as a necessary element of the self-policing privilege should be stressed in law school so that it is impressed on the lawyer during his formative years.” ABA REPORT, *supra* note 61 at 169.

²⁵¹ Bazelon, *supra* note 185.

²⁵² *Id.* at 392–94, 398 n.9, 400–03.

²⁵³ *Id.* at 408–25.

²⁵⁴ 563 U.S. 51, 107 (2011) (Ginsburg, J., dissenting).

Professor Bazelon provided the following additional statement, with which we agree:

While it is true that prosecutor and defender offices have a responsibility to train and continue to educate their lawyers, it is equally true that they deserve newly-minted graduates who are thoroughly familiar with the applicable legal and ethical rules. Familiarity does not mean a rote recitation of the applicable standards, but rather an ability to apply the standards in [the] real world of high stakes practice. The argument that law schools owe their students this kind of hands-on training has gained more force in recent years, as the economic downturn has produced a glut of J.D.s in search of jobs. Positions for new lawyers in federal and state prosecutor and defender offices are becoming increasingly difficult to obtain in this era of austerity. I believe it is incumbent upon all law schools to provide education that not only teaches the substance of the law, but also introduces students to the kinds of skills [required for] the actual practice of law and a real world knowledge of the applicable rules of professional ethics. Those skills are essential to [students'] ability to get decently paying jobs, and more importantly, to do those jobs with competence and integrity. I therefore recommend that the Association of American Law Schools, and other similar organizations, add to their agendas teaching substantive and procedural criminal law, and the thorny ethical issues that often arise in that practice.²⁵⁵

CONCLUSION

Prosecutorial deviations from ethical standards have continued to result in reversals of criminal convictions.²⁵⁶ Nevertheless, we firmly believe the vast majority of prosecutors are ethical women and men who strive to achieve justice. At the same time, we are dismayed at the small number of reported incidents in which prosecutors, both state and federal, have been cited for straying from the high standards of professional conduct imposed on them—those who are elected or appointed to enforce the law. We cannot fathom why

²⁵⁵ Email from Lara A. Bazelon, Director, Loyola Project for the Innocent, Loyola Law School, Los Angeles, to Thomas P. Sullivan, Jenner & Block, Chicago, and Maurice Possley (March 1, 2015) (on file with authors); *see also* MEDWED, *supra* note 177, at 33–34.

²⁵⁶ *E.g.*, *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (*per curiam*) (non-disclosure of evidence favorable to defendant); *United States v. Dvorin*, No. 15-10142, 2016 WL 1085744, at *10 (5th Cir. Mar. 18, 2016) (non-disclosure of evidence favorable to defendant; knowing use of false testimony; reckless disregard of duties; vindictive prosecution); *Zapata v. Vasquez*, 788 F.3d 1106, 1110–11 (9th Cir. 2015) (improper closing argument); *United States v. Mahaffy*, 693 F.3d 113, 127–34 (2d Cir. 2012) (non-disclosure of evidence favorable to defendants); *Betancourt v. Warden*, 2016 WL 490285 (Conn. Super. Ct. Jan. 12, 2016) (non-disclosure of evidence favorable to defendant); *McCoy v. Delaware*, 112 A.3d 239, 266 (Del. 2015) (improper cross examination of defendant); *Starling v. Delaware*, 130 A.3d 316 (Del. 2015) (improper conduct during trial and in closing argument); *Wright v. State*, 67 A.3d 972, 994 (Del. 2014) (non-disclosure of evidence favorable to defendant); *Cardona v. Florida*, 185 So. 3d 514 (Fla. 2016) (improper cross examination and closing argument); *Evans v. Florida*, 177 So. 3d 1219, 1230–39 (Fla. 2015) (improper closing arguments); *Crew v. Florida*, 146 So. 3d 101, 107–11 (Fla. Dist. Ct. App. 2014) (improper closing arguments).

so many withhold exculpatory information, tamper with witnesses and evidence, engage in improper courtroom conduct, and the like, only to, claim that their failures were “harmless error” and therefore of no real or lasting consequence when challenged. The very opposite is true: whether a conviction is undone or not, the consequence is palpable—it is a stain on the reputation of the entire legal profession.

APPENDIX

THE STATUS OF LAWYER AND JUDGE
REPORTING RULES IN THE 50 STATES*1. Rules on lawyer reporting obligations.*

All states except California have adopted the ABA Model Rules of Professional Conduct. Of those states that have adopted the ABA Model Rules of Professional Conduct, all but two states have retained the word “shall” in describing lawyers’ duty to report misconduct by other lawyers. Georgia and Washington have substituted “should” for “shall.”

California has a single, narrow statutory provision on lawyers reporting misconduct by lawyers. The California Business and Professions Code § 6068 provides that lawyers have a duty to self-report to the agency charged with attorney discipline, in writing, within thirty days of the time the attorney has knowledge of the reversal of a civil judgment against him based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation.

2. Rules on judicial reporting obligations.

As to judges, twenty nine states have adopted amendments based upon the Revised Judicial Code. Most of these states have provisions regarding the judicial reporting of lawyer misconduct that are substantially similar to Model Rule 2.15. States that have not amended their codes of judicial conduct based on the Revised Judicial Code also have provisions regarding the judicial response to either misconduct or “unprofessional conduct” by a lawyer. The relevant provisions in the codes of judicial conduct for some of these states are substantially similar to the obligation contained in Model Rule 2.15.

Although the judicial codes of all states have provisions regarding the judicial response to misconduct or “unprofessional conduct” by a lawyer, not all states require a judge to report misconduct to the appropriate disciplinary authority. The states that do not impose this requirement can be placed into two categories:

(1) States that use “should” or equivalent variation rather than “shall”:

Alabama
Delaware
Idaho
Kentucky
Louisiana

Michigan
North Carolina
Virginia
Washington

(2) States whose code of judicial conduct has mandatory language, but has other language in the same provision that does not require reporting to a particular or “appropriate” disciplinary body. Most give judges discretion to take “appropriate action.” The following states can be placed in this category:

Alaska
California
Florida
Maryland
Massachusetts
New York
Texas

Along with its judicial code, California also has a provision in its Professions Code, § 6086.7, that requires courts to notify the State Bar of orders of contempt against lawyers; when a judgment is modified or reversed based on lawyer misconduct, incompetence or willful misrepresentation; or when certain sanctions are imposed against a lawyer.

